

## 16B Am. Jur. 2d Constitutional Law § 628

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### a. Meaning and Import of Property and Property Rights

## § 628. Meaning and import of property and property rights, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1112(3)

The right to use and enjoy, and to acquire and sell, one's property, is a fundamental right protected by state and Federal Constitutions.<sup>1</sup> However, the United States Constitution does not itself create property rights.<sup>2</sup> The Federal Constitution, designed as a charter of negative liberties, generally does not impose any affirmative duty on the federal or state governments to provide services or procedural protections to rights in property.<sup>3</sup> Property interests for due process purposes are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.<sup>4</sup> However, the Fifth Amendment to the Constitution does prevent the federal government or its agencies from depriving any person of his or her property without due process of law; and the 14th Amendment and all the various state constitutions prevent any action by a state which would accomplish such deprivation.<sup>5</sup>

### Practice Tip:

The due process guarantee as it relates to property rights raises two questions: first, what is property, and second, what is a deprivation. Although as an abstract matter these questions seem distinct, in the cases it is very difficult to determine whether a decision turned upon the "property" question or upon the "taking" question. In general, however, what is due process in a procedure

affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all the circumstances which may render the proceeding appropriate to the nature of the case.<sup>6</sup>

The inhibition against taking property without just compensation has been deemed applicable in contexts other than the field of eminent domain.<sup>7</sup> There is an important distinction between liberty and property with respect to the protection included in the 14th Amendment as far as the persons who may invoke the constitutional guarantees of due process are concerned; for although corporations cannot invoke the "liberty" concept for their own protection, since they are not natural persons,<sup>8</sup> they are fully entitled to the protection of the Due Process Clause in their property or their property rights.<sup>9</sup>

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#### Footnotes

- 1 [Louis Finocchiaro, Inc. v. Nebraska Liquor Control Com'n](#), 217 Neb. 487, 351 N.W.2d 701 (1984); [Buskey v. Town of Hanover](#), 133 N.H. 318, 577 A.2d 406 (1990); [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 2 For a complete discussion of the particular rights encompassed within the right to property, see §§ 629 to 639. [Papagolos v. Lafayette County School Dist.](#), 972 F. Supp. 2d 912, 302 Ed. Law Rep. 1141 (N.D. MS Oxford Div. 2013), amended on reconsideration, (Nov. 13, 2013); [Heflin v. Kentucky State Racing Com'n](#), 701 F.2d 599 (6th Cir. 1983); [O'Gorman v. City of Chicago](#), 777 F.3d 885 (7th Cir. 2015); [Pike v. Gallagher](#), 829 F. Supp. 1254 (D.N.M. 1993); [Snodgrass-King Pediatric Dental Associates, P.C. v. DentaQuest USA Ins. Co., Inc.](#), 79 F. Supp. 3d 753 (M.D. Tenn. 2015).
- 3 [Hinman v. Lincoln Towing Service, Inc.](#), 771 F.2d 189 (7th Cir. 1985).
- 4 [O'Gorman v. City of Chicago](#), 777 F.3d 885 (7th Cir. 2015); [Fowkes v. Wayne County](#), 836 F. Supp. 2d 526 (E.D. Mich. 2011); [Delozier v. Bradley County Bd. of Educ.](#), 44 F. Supp. 3d 748, 314 Ed. Law Rep. 381 (E.D. Tenn. 2014); [Merrill v. Maine Public Employees Retirement System](#), 2014 ME 100, 98 A.3d 211, 309 Ed. Law Rep. 441 (Me. 2014).
- 5 Whether a property interest exists requiring due process protection can be determined only by examination of particular statute, rule, or ordinance in question. [Guzman v. Piercy](#), 155 Idaho 928, 318 P.3d 918 (2014). [Buchanan v. Warley](#), 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917); [People v. Carlon](#), 161 Cal. App. 3d 1193, 208 Cal. Rptr. 18 (2d Dist. 1984); [City of Miami Beach v. Forte Towers, Inc.](#), 305 So. 2d 764 (Fla. 1974); [Riden v. Philadelphia, B. & W. R. Co.](#), 182 Md. 336, 35 A.2d 99 (1943); [Rassner v. Federal Collateral Soc.](#), 299 Mich. 206, 300 N.W. 45 (1941); [Farnow v. Department 1 of Eighth Judicial Dist. Court in and for Clark County](#), 64 Nev. 109, 178 P.2d 371 (1947); [Mourning v. Correctional Medical Services, \(CMS\) of St. Louis, Mo.](#), 300 N.J. Super. 213, 692 A.2d 529 (App. Div. 1997).
- 6 As to the protection of property rights of aliens, see [Am. Jur. 2d, Aliens and Citizens](#) §§ 2065 to 2067. [Anderson Nat. Bank v. Lockett](#), 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944); [In re Matson](#), 293 N.Y. 476, 58 N.E.2d 501 (1944).
- 7 As to the procedural aspect of due process of law, see §§ 944 to 964. [State v. City of Stuart](#), 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307 (1929).
- 8 As to eminent domain, see [Am. Jur. 2d, Eminent Domain](#) §§ 1 et seq. § 611.
- 9 [Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary](#), 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468 (1925).

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## 16B Am. Jur. 2d Constitutional Law § 629

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

###### a. Meaning and Import of Property and Property Rights

## § 629. Nature of constitutionally guaranteed property rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1111

"Property" in the constitutional sense means not tangible property itself but rather the right to possess, use, enjoy, and dispose of property.<sup>1</sup> Individuals have a right to own and enjoy private property;<sup>2</sup> and property owners have a right under the Federal Constitution not to have the government physically occupy their property without due process of law or without just compensation.<sup>3</sup> The bundle of venerable rights associated with property is strongly protected in state constitutions and must be trod upon lightly, no matter how great the weight of other forces.<sup>4</sup>

### Observation:

A state constitutional provision which guarantees the right to acquire and possess property does not impose upon the state government any affirmative obligation to finance housing for homeless persons<sup>5</sup> or to provide them with emergency shelter assistance.<sup>6</sup>

The right of property has been described as a fundamental,<sup>7</sup> natural,<sup>8</sup> inherent,<sup>9</sup> and inalienable right.<sup>10</sup> It is sometimes characterized judicially as a sacred right,<sup>11</sup> the protection of which is one of the most important objects of government.<sup>12</sup> It is said that the right of property lies at the foundation of our constitutional government and is necessary to the existence of civil liberty and free institutions,<sup>13</sup> and that such right is essential in our conception of freedom.<sup>14</sup>

A provision of a state constitution, declaring the inherent rights of mankind, protects the citizen's right to the enjoyment of private property, and governmental interference with this right is circumscribed by the due process provisions of the Fifth and 14th Amendments to the United States Constitution.<sup>15</sup> The constitutional prohibition against the deprivation of property without due process of law reflects the high value, embedded in constitutional and political history, that is placed on a person's right to enjoy what is his or hers free of any unreasonable governmental interference.<sup>16</sup>

**Practice Tip:**

While property ownership is clearly one factor to be considered in determining whether an individual's rights have been violated, property rights are neither the beginning nor the end of the inquiry. Other factors to be weighed include whether a defendant has possessory interest in the things seized or the place searched; whether the defendant has a right to exclude others from that place; whether the defendant has exhibited subjective expectations that the place would remain free from governmental invasion; whether the defendant took normal precautions to maintain his or her privacy; and whether the defendant was legitimately on the premises.<sup>17</sup>

Due process is not denied by a statute which secures complete protection of property rights only so long as the property rights require the protection<sup>18</sup> or continue to exist.<sup>19</sup>

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**Footnotes**

- 1 [Louis Finocchiaro, Inc. v. Nebraska Liquor Control Com'n](#), 217 Neb. 487, 351 N.W.2d 701 (1984); [Buskey v. Town of Hanover](#), 133 N.H. 318, 577 A.2d 406 (1990).  
For a complete discussion of the particular rights encompassed within the right to property, see §§ 629 to 640.
- 2 [Farmers Trust and Sav. Bank v. Manning](#), 359 N.W.2d 461, 44 A.L.R.4th 1219 (Iowa 1984); [Grondin v. Town of Hinsdale](#), 122 N.H. 882, 451 A.2d 1299 (1982); [BAC, Inc. v. Board of Sup'rs of Millcreek Tp.](#), 534 Pa. 381, 633 A.2d 144 (1993).
- 3 [Bray v. Alexandria Women's Health Clinic](#), 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34, 169 A.L.R. Fed. 649 (1993).
- 4 [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

- 5 L.T. v. New Jersey Dept. of Human Services, Div. of Family Development, 264 N.J. Super. 334, 624 A.2d 990 (App. Div. 1993), decision rev'd on other grounds, 134 N.J. 304, 633 A.2d 964 (1993).
- 6 Franklin v. New Jersey Dept. of Human Services, 225 N.J. Super. 504, 543 A.2d 56 (App. Div. 1988), judgment aff'd, 111 N.J. 1, 543 A.2d 1 (1988).
- 7 Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165 (1996); Buskey v. Town of Hanover, 133 N.H. 318, 577 A.2d 406 (1990); 1234 Broadway LLC v. Feng Chai Lin, 25 Misc. 3d 476, 883 N.Y.S.2d 864 (N.Y. City Civ. Ct. 2009); Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968); City of Cleveland v. Ruple, 130 Ohio St. 465, 5 Ohio Op. 69, 200 N.E. 507, 103 A.L.R. 853 (1936); Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468 (Tex. 2012).
- 8 N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249, 484 A.2d 729 (Law Div. 1984); Walton v. Johnson, 879 S.W.2d 942 (Tex. App. Tyler 1994), writ denied, (Nov. 17, 1994).
- 9 Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968); Walton v. Johnson, 879 S.W.2d 942 (Tex. App. Tyler 1994), writ denied, (Nov. 17, 1994).
- 10 Newland v. Child, 73 Idaho 530, 254 P.2d 1066 (1953); Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 322 Ill. Dec. 548, 891 N.E.2d 839 (2008); Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968); City of Cleveland v. Ruple, 130 Ohio St. 465, 5 Ohio Op. 69, 200 N.E. 507, 103 A.L.R. 853 (1936); Walton v. Johnson, 879 S.W.2d 942 (Tex. App. Tyler 1994), writ denied, (Nov. 17, 1994).
- 11 Replogle v. City of Little Rock, 166 Ark. 617, 267 S.W. 353, 36 A.L.R. 1333 (1924); State v. City of Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307 (1929); Fitzhugh v. City of Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279 (1923).
- 12 Schiller Piano Co. v. Illinois Northern Utilities Co., 288 Ill. 580, 123 N.E. 631, 11 A.L.R. 454 (1919).
- 13 Miller v. McKenna, 23 Cal. 2d 774, 147 P.2d 531 (1944).
- 14 Moore v. City of Tallahassee, 928 F. Supp. 1140 (N.D. Fla. 1995); Newland v. Child, 73 Idaho 530, 254 P.2d 1066 (1953).
- 15 Township of Exeter v. Zoning Hearing Bd. of Exeter Tp., 599 Pa. 568, 962 A.2d 653 (2009).
- 16 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 17 U.S. v. Haydel, 649 F.2d 1152 (5th Cir. 1981), opinion corrected on other grounds on denial of reh'g, 664 F.2d 84 (5th Cir. 1981).
- 18 May's Furs and Ready to Wear v. Bauer, 282 N.Y. 331, 26 N.E.2d 279 (1940).
- 19 Tennessee v. Dunlap, 426 U.S. 312, 96 S. Ct. 2099, 48 L. Ed. 2d 660 (1976) (the Due Process Clause of the 14th Amendment is not violated by the termination of a State Air National Guardsman's employment as a technician for the Guard upon his discharge from the Guard); Royster v. Board of Trustees of Anderson County School Dist. No. Five, 774 F.2d 618, 27 Ed. Law Rep. 1103 (4th Cir. 1985).

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## 16B Am. Jur. 2d Constitutional Law § 630

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

###### a. Meaning and Import of Property and Property Rights

## § 630. Limitations on constitutionally guaranteed property rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1111

A property owner generally has the constitutional right to make any use of their property they desire so long as they do not endanger or threaten the health and safety of the general public.<sup>1</sup> While the right to use one's own real property as one sees fit is a property right fully protected by the due process clauses of the state and Federal Constitutions, such use is subject to the proper exercise of local police powers.<sup>2</sup> However, at least in some jurisdictions, the right to use lawfully regulated property as one wishes is not deemed a fundamental right.<sup>3</sup> The right to freely alienate real property has also been termed not a "fundamental right" that calls for the application of strict scrutiny.<sup>4</sup> While the constitutional guarantees with reference to the enjoyment of property should remain stable, it is equally true that they are not so rigid that they should not, within the realm of reasonableness, bend to accommodate the public welfare and the well-being of the whole people.<sup>5</sup>

### Observation:

Where one piece of property is subject to the police power of two municipalities, the constitutional right as owner of that property to use and enjoy it however one sees fit must prevail with respect to a competition between the municipalities over application of their police powers to the property.<sup>6</sup>

Property rights are subject to reasonable regulation to promote the general welfare.<sup>7</sup> Furthermore, if Congress or a state legislature creates a property right, they perforce have broad powers to limit that right; anyone accepting the property would of necessity take subject to those limitations.<sup>8</sup>

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#### Footnotes

- 1 [Allied-General Nuclear Services v. U.S.](#), 839 F.2d 1572 (Fed. Cir. 1988); [Richardson v. City of Little Rock Planning Com'n](#), 295 Ark. 189, 747 S.W.2d 116 (1988); [Erb v. Maryland Dept. of Environment](#), 110 Md. App. 246, 676 A.2d 1017 (1996); [Andrews v. Lake Serene Property Owners Ass'n](#), 434 So. 2d 1328 (Miss. 1983).
- 2 [Sundheim v. Board of County Com'rs of Douglas County](#), 904 P.2d 1337 (Colo. App. 1995), *aff'd*, 926 P.2d 545 (Colo. 1996); [Napleton v. Village of Hinsdale](#), 229 Ill. 2d 296, 322 Ill. Dec. 548, 891 N.E.2d 839 (2008); [Pennsylvania Medical Soc. v. Foster](#), 137 Pa. Commw. 192, 585 A.2d 595 (1991).  
As a result of the subordination of private property to the public welfare under the state constitution, police power regulations are upheld although they may interfere with the enjoyment of liberty or the acquisition, possession and production of private property. [Toledo v. Tellings](#), 114 Ohio St. 3d 278, 2007-Ohio-3724, 871 N.E.2d 1152 (2007).
- 3 [Whaler's Village Club v. California Coastal Com.](#), 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (2d Dist. 1985); [Fragopoulos v. Rent Control Bd. of Cambridge](#), 408 Mass. 302, 557 N.E.2d 1153 (1990); [Berkley Condominium Ass'n, Inc. v. Berkley Condominium Residences, Inc.](#), 185 N.J. Super. 313, 448 A.2d 510 (Ch. Div. 1982).
- 4 [National Western Life Ins. Co. v. Commodore Cove Imp. Dist.](#), 678 F.2d 24 (5th Cir. 1982).
- 5 [Richardson v. City of Little Rock Planning Com'n](#), 295 Ark. 189, 747 S.W.2d 116 (1988).
- 6 [Cleco Power, LLC v. Beauregard Elec. Co-op., Inc.](#), 984 So. 2d 925 (La. Ct. App. 3d Cir. 2008), *writ denied*, 992 So. 2d 1014 (La. 2008).
- 7 [Laguna Royale Owners Assn. v. Darger](#), 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (4th Dist. 1981); [Napleton v. Village of Hinsdale](#), 229 Ill. 2d 296, 322 Ill. Dec. 548, 891 N.E.2d 839 (2008); [Fragopoulos v. Rent Control Bd. of Cambridge](#), 408 Mass. 302, 557 N.E.2d 1153 (1990).  
Provisions of the Fair Housing Amendments Act of 1988 prohibiting discrimination based on familial status did not violate the contract and property rights of elderly Florida owners whose dwelling units had restrictive covenants prohibiting children in violation of the 10th Amendment or the principles of federalism under the privacy amendment to the Florida declaration of rights. [Seniors Civil Liberties Ass'n, Inc. v. Kemp](#), 761 F. Supp. 1528 (M.D. Fla. 1991), *decision aff'd*, 965 F.2d 1030 (11th Cir. 1992).
- 8 [Kunkes v. U.S.](#), 32 Fed. Cl. 249 (1994), *aff'd*, 78 F.3d 1549 (Fed. Cir. 1996).

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## 16B Am. Jur. 2d Constitutional Law § 631

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

###### a. Meaning and Import of Property and Property Rights

## § 631. Limitations on constitutionally guaranteed property rights—Government regulation of property use

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1111, 1112(1)

The constitutionally protected right of a property owner to do as they see fit with their own property is not absolute<sup>1</sup> but is subject to such reasonable restraints and regulations established by law as the legislature, under governing and controlling power vested in it by the constitution, may think necessary and expedient.<sup>2</sup> A constitutional provision stating that private property shall ever be held inviolate but subservient to the public welfare requires that legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property.<sup>3</sup> There is, for instance, no general constitutional right to be free from all changes in land use laws,<sup>4</sup> and there is no constitutionally protected right to the most profitable or the most desirable use of real property.<sup>5</sup> A state elective share statute, in permitting a decedent's spouse to accept a statutory share rather than a testamentary share of a decedent's estate, is rationally related to the legitimate legislative purpose of safeguarding the public welfare and thus does not violate the state constitutional provision protecting possession of property; the statute seeks to provide a surviving spouse with a minority of a decedent-spouse's assets in the event the surviving spouse does not receive as much through the testamentary disposition.<sup>6</sup> The rights attendant with ownership of property do not include the right to be free from all government interference with the uses to which an owner puts his or her property or condition in which he or she maintains it, and thus requiring compliance with state and local building codes and injunctions does not deprive a property owner of any property rights.<sup>7</sup>

Aside from specific constitutional limitations, private property is subject to the limitation which commands each person to use his or her own property so as not to injure such person's neighbor,<sup>8</sup> and to three rights of government:<sup>9</sup> (1) the right of eminent domain,<sup>10</sup> (2) the right of taxation,<sup>11</sup> and (3) the right to exercise the police power.<sup>12</sup>

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## Footnotes

- 1 [People v. Beach](#), 147 Cal. App. 3d 612, 195 Cal. Rptr. 381 (2d Dist. 1983); [Shavers v. Duval County](#), 73 So. 2d 684 (Fla. 1954); [Zahm v. Peare](#), 502 N.E.2d 490 (Ind. Ct. App. 1985); [Midwest Messenger Ass'n v. Spire](#), 223 Neb. 748, 393 N.W.2d 438, 78 A.L.R.4th 469 (1986); [Berkley Condominium Ass'n, Inc. v. Berkley Condominium Residences, Inc.](#), 185 N.J. Super. 313, 448 A.2d 510 (Ch. Div. 1982); [Porter v. City of Oberlin](#), 3 Ohio App. 2d 158, 32 Ohio Op. 2d 235, 209 N.E.2d 629 (9th Dist. Lorain County 1964), judgment rev'd in part on other grounds, 1 Ohio St. 2d 143, 30 Ohio Op. 2d 491, 205 N.E.2d 363 (1965); [Pennsylvania Medical Soc. v. Foster](#), 137 Pa. Commw. 192, 585 A.2d 595 (1991); [City of Breckenridge v. Cozart](#), 478 S.W.2d 162 (Tex. Civ. App. Eastland 1972), writ refused n.r.e., (July 26, 1972).
- 2 [Richardson v. City of Little Rock Planning Com'n](#), 295 Ark. 189, 747 S.W.2d 116 (1988); [Beeding v. Miller](#), 167 Ill. App. 3d 128, 117 Ill. Dec. 707, 520 N.E.2d 1058 (2d Dist. 1988); [Cady v. City of Detroit](#), 289 Mich. 499, 286 N.W. 805 (1939); [Porter v. City of Oberlin](#), 3 Ohio App. 2d 158, 32 Ohio Op. 2d 235, 209 N.E.2d 629 (9th Dist. Lorain County 1964), judgment rev'd in part on other grounds, 1 Ohio St. 2d 143, 30 Ohio Op. 2d 491, 205 N.E.2d 363 (1965).  
In reviewing the constitutionality of a zoning ordinance under a provision of a state constitution protecting a citizen's right to the enjoyment of private property and the [U.S. Const. Amendments V, XIV](#), courts employ a substantive due process inquiry, involving a balancing of landowners' rights against the public interest sought to be protected by an exercise of the police power. [Township of Exeter v. Zoning Hearing Bd. of Exeter Tp.](#), 599 Pa. 568, 962 A.2d 653 (2009).  
As to rights against destruction of property, generally, see §§ 636, 637.
- 3 [Groch v. Gen. Motors Corp.](#), 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008).
- 4 [New Port Largo, Inc. v. Monroe County](#), 95 F.3d 1084 (11th Cir. 1996).  
Any adverse economic effects of land use regulation do not give rise to a constitutional claim, so long as the property retains some value. [Nash v. City of Santa Monica](#), 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).
- 5 [Land Associates v. Metropolitan Airport Authority](#), 547 F. Supp. 1128 (M.D. Tenn. 1982), judgment aff'd, 712 F.2d 248 (6th Cir. 1983); [Sundheim v. Board of County Com'rs of Douglas County](#), 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996); [Edgewater Inv. Associates v. Borough of Edgewater](#), 103 N.J. 227, 510 A.2d 1178 (1986).  
There is no constitutional right to any particular rate of return on property. [Spring Realty Co. v. New York City Loft Bd.](#), 127 Misc. 2d 1090, 487 N.Y.S.2d 973 (Sup 1985), aff'd, 117 A.D.2d 1029, 498 N.Y.S.2d 241 (1st Dep't 1986), order aff'd as modified on other grounds, 69 N.Y.2d 657, 511 N.Y.S.2d 830, 503 N.E.2d 1367 (1986).
- 6 [In re Estate of Magee](#), 988 So. 2d 1 (Fla. 2d DCA 2007).
- 7 [Rainey v. City of Norfolk](#), 14 Va. App. 968, 421 S.E.2d 210 (1992).
- 8 § 335.
- 9 [City of Cleveland v. Ruple](#), 130 Ohio St. 465, 5 Ohio Op. 69, 200 N.E. 507, 103 A.L.R. 853 (1936).
- 10 [Am. Jur. 2d, Eminent Domain](#) §§ 1 et seq.
- 11 [Am. Jur. 2d, State and Local Taxation](#) §§ 1 et seq.
- 12 §§ 383 to 388.

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## 16B Am. Jur. 2d Constitutional Law § 632

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

###### a. Meaning and Import of Property and Property Rights

## § 632. What is property in context of constitutionally guaranteed property rights

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### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109, 1110

The word "property" in the 14th Amendment embraces all valuable interests which a person may possess outside of himself or herself—outside of life and liberty.<sup>1</sup> It is more than the mere thing which a person owns; it includes the right to acquire, use, and dispose of it, and the Constitution protects these essential attributes.<sup>2</sup> The right of property has been also defined as the right to acquire, possess, and enjoy particular things and objects in any way consistent with the equal rights of others and the just exactions and demands of the state.<sup>3</sup>

In applying the Due Process Clause, different kinds of property are not distinguished.<sup>4</sup> Property interests subject to procedural due process protection are not limited by a few rigid, technical forms; rather, "property" denotes a broad range of interests that are secured by existing rules or understandings.<sup>5</sup> In order to constitute a property right for purposes of due process, one must have a current valid expectation, based on the government's implied promise to continue this entitlement, in an important, personal, monetizable interest.<sup>6</sup>

### Observation:

The definition of property may turn on a question of state law, but if the property interest is found to exist, the question of what process is due is a matter of federal law.<sup>7</sup>

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#### Footnotes

- 1 [Campbell v. Holt](#), 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885).
- 2 [Terrace v. Thompson](#), 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); [Great Lakes Higher Educ. Corp. v. Cavazos](#), 911 F.2d 10, 62 Ed. Law Rep. 434 (7th Cir. 1990); [Gaulden v. Kirk](#), 47 So. 2d 567 (Fla. 1950); [State St. Furniture Co. v. Armour & Co.](#), 345 Ill. 160, 177 N.E. 702, 76 A.L.R. 1298 (1931); [Fitzhugh v. City of Jackson](#), 132 Miss. 585, 97 So. 190, 33 A.L.R. 279 (1923).  
For a complete discussion of the particular rights encompassed within the right to property, see §§ 629 to 639.
- 3 [BAC, Inc. v. Board of Sup'rs of Millcreek Tp.](#), 534 Pa. 381, 633 A.2d 144 (1993).
- 4 [North Georgia Finishing, Inc. v. Di-Chem, Inc.](#), 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).
- 5 [Gotkin v. Miller](#), 514 F.2d 125 (2d Cir. 1975).
- 6 [Cervoni v. Secretary of Health, Ed. and Welfare](#), 581 F.2d 1010 (1st Cir. 1978); [White Plains Towing Corp. v. Patterson](#), 991 F.2d 1049 (2d Cir. 1993).
- 7 [Kovats v. Rutgers](#), 749 F.2d 1041, 21 Ed. Law Rep. 801 (3d Cir. 1984).

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## 16B Am. Jur. 2d Constitutional Law § 633

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

###### a. Meaning and Import of Property and Property Rights

## § 633. Types of property in context of constitutionally guaranteed property rights

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### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109

### A.L.R. Library

[Recovery by writer, artist, or entertainer for loss of publicity or reputation resulting from breach of contract, 96 A.L.R.3d 437](#)

The types of property rights which are protected by the guarantee of due process are varied and may take many forms.<sup>1</sup> The guarantee refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law with all the rights incidental thereto.<sup>2</sup> It relates not only to those tangible things of which one may be the owner but to everything which he or she may have of an exchangeable value.<sup>3</sup> The 14th Amendment's protection of "property" does not only safeguard the rights of undisputed ownership but also extends protection to any significant property interest, including statutory entitlements.<sup>4</sup> No question of real<sup>5</sup> and personal<sup>6</sup> property. However, the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money,<sup>7</sup> and it is when the question arises with respect to the less tangible forms of property that an inquiry as to what is property must be made.<sup>8</sup>

To constitute a violation of the provision against depriving any person of his or her property without due process of law, it should appear that such person has a property interest in the particular thing of which he or she is alleged to have been deprived.<sup>9</sup> It is only a vested right which cannot be taken away except by due process of law.<sup>10</sup> To have a property interest in a benefit protected by procedural due process, a person must have more than an abstract need or desire for it, and he or she must have more than a unilateral expectation of it; in short, he or she must have a legitimate claim of entitlement to it.<sup>11</sup> Procedural requirements ordinarily do not transform a unilateral expectation into a protected due process property interest in a government benefit; only if procedural requirements amount to a significant substantive restriction on decision-making do they give rise to a protected property interest.<sup>12</sup>

**Observation:**

Just as a state may create a property interest that is entitled to constitutional protection, the state has power to condition a permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain interest.<sup>13</sup>

It has been held, though there is also some authority to the contrary, that a public office is not property within the meaning of the federal constitutional provision against deprivation of property without due process of law.<sup>14</sup> However, reputation alone, apart from some more tangible interests such as employment, is not "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.<sup>15</sup> Likewise, there are certain things which a person may own but in which there are no property rights recognized by the Constitution.<sup>16</sup> The constitutional protection of property rights is not to be unduly extended to tenuous interests that may vanish even without legal interference.<sup>17</sup>

Certain privileges as to which a qualified right of property may be recognized are inherently subject to legislative regulation and no such vested right in them exists as will prevent the legislature from withdrawing such privileges from those who previously enjoyed them.<sup>18</sup> Licenses and permits generally are not considered property in any constitutional sense.<sup>19</sup> Accordingly, the revocation of such qualified rights does not amount to a deprivation of property without due process of law.<sup>20</sup> The separate character of property acquired during marriage by gift, devise, or descent is constitutional in nature, however.<sup>21</sup> Generalized environmental concerns do not constitute property or liberty interests requiring the protection of the Due Process Clause.<sup>22</sup> However, statutory entitlement to receipt of an educational assistance allowance under a federal statute does constitute a "property right" protected by the Due Process Clause.<sup>23</sup> The right of a creditor to collect a garnishment is "a significant property interest" protected by the Due Process Clause of the 14th Amendment.<sup>24</sup> Likewise, the right to practice law is a valuable property right which can be denied only by due process of law.<sup>25</sup>

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**Footnotes**

- 1 [Board of Regents of State Colleges v. Roth](#), 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).
- 2 [Ex parte Quarg](#), 149 Cal. 79, 84 P. 766 (1906); [Herlihy v. Donohue](#), 52 Mont. 601, 161 P. 164 (1916); [Hall v. State](#), 100 Neb. 84, 158 N.W. 362 (1916).

- 3 Board of Education of Normal School Dist. v. Blodgett, 155 Ill. 441, 40 N.E. 1025 (1895); Harbison v. Knoxville Iron Co., 103 Tenn. 421, 53 S.W. 955 (1899), *aff'd*, 183 U.S. 13, 22 S. Ct. 1, 46 L. Ed. 55 (1901). A bank account is a form of property for purposes of the Due Process Clause of the U.S. Const. Amend. XIV. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).
- 4 *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 5 *Mott v. U.S.*, 283 U.S. 747, 51 S. Ct. 642, 75 L. Ed. 1385 (1931); *Jacobsen v. Superior Court of Sonoma County*, Department No. 2, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923); *Murrison v. Fenstermacher*, 166 Kan. 568, 203 P.2d 160, 7 A.L.R.2d 1360 (1949); *Todd v. Board of Educational Lands and Funds of Neb.*, 154 Neb. 606, 48 N.W.2d 706 (1951).
- 6 *Lynch v. U.S.*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934); *Frost v. Corporation Commission*, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929); *Superior Water, Light & Power Co. v. City of Superior*, 263 U.S. 125, 44 S. Ct. 82, 68 L. Ed. 204 (1923); *Security-First Nat Bank of Los Angeles v. Rindge Land & Navigation Co.*, 85 F.2d 557, 107 A.L.R. 1240 (C.C.A. 9th Cir. 1936).  
As to a vested right of action as property, see § 738.  
As to judgments and rights acquired thereby as property, see § 645.
- 7 *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).
- 8 *Kenner v. Kenner*, 139 Tenn. 211, 201 S.W. 779 (1918) (the right of custody of a child, aside from the child's ability or inability to perform services, has been held not to be a right of property).  
The expectation of a veteran that he would be furnished domiciliary care and vocational training benefits at specific VA facilities did not constitute a "property" interest, so that he could be relocated without a hearing. *Moore v. Johnson*, 582 F.2d 1228 (9th Cir. 1978).
- 9 *City of New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79, 12 S. Ct. 142, 35 L. Ed. 943 (1891); *City of Birmingham v. Graffeo*, 551 So. 2d 357 (Ala. 1989) (a city council seat is not property); *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 65 A. 489 (Ct. Err. & App. 1906).
- 10 *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N.W. 97 (1939); *Crump v. Guyer*, 1916 OK 254, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331 (1916).  
The word "property" as used in the Due Process Clause refers to vested rights, and there is no reference to mere concessions or privileges which may be bestowed or withheld at will. *Senior Citizens League v. Department of Social Sec. of Wash.*, 38 Wash. 2d 142, 228 P.2d 478 (1951).
- 11 *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Santos v. City of Fall River*, 942 F. Supp. 2d 178 (D. Mass. 2013); *Gonzales v. City of Albuquerque*, 849 F. Supp. 2d 1123 (D.N.M. 2011), *aff'd*, 701 F.3d 1267 (10th Cir. 2012).
- 12 *Burch v. Smathers*, 990 F. Supp. 2d 1063 (D. Idaho 2014).
- 13 *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982).
- 14 Am. Jur. 2d, Public Officers and Employees § 13.
- 15 *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).
- 16 *Burke, on Behalf and for Benefit of Local Cincinnati of Communist Labor Party v. American Legion of Ohio*, Robert E. Bentley Post, No. 50, 14 Ohio App. 243, 1921 WL 1301 (1st Dist. Hamilton County 1921).
- 17 *Addiss v. Selig*, 147 Misc. 731, 264 N.Y.S. 816 (Sup 1933), *aff'd*, 240 A.D. 829, 266 N.Y.S. 1008 (1st Dep't 1933), *rev'd on other grounds*, 264 N.Y. 274, 190 N.E. 490, 92 A.L.R. 1384 (1934).
- 18 *District of Columbia v. R.P. Andrews Paper Co.*, 256 U.S. 582, 41 S. Ct. 545, 65 L. Ed. 1103 (1921); *Doyle v. Kahl*, 242 Iowa 153, 46 N.W.2d 52 (1951).
- 19 Am. Jur. 2d, Licenses and Permits § 2.
- 20 *State v. Durein*, 70 Kan. 1, 78 P. 152 (1904), *on reh'g*, 70 Kan. 13, 80 P. 987 (1905) and *aff'd*, 208 U.S. 613, 28 S. Ct. 567, 52 L. Ed. 645 (1908).
- 21 *Walton v. Johnson*, 879 S.W.2d 942 (Tex. App. Tyler 1994), *writ denied*, (Nov. 17, 1994).  
Testators have a constitutional right to be free from unreasonable legislative restraint upon their right to devise property. *Buskey v. Town of Hanover*, 133 N.H. 318, 577 A.2d 406 (1990).
- 22 *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 67 A.L.R. Fed. 1 (D.C. Cir. 1981).
- 23 *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980).
- 24 *Cottrell v. Public Finance Corp.*, 163 W. Va. 310, 256 S.E.2d 575 (1979).

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[Reese v. Board of Com'rs of Alabama State Bar](#), 379 So. 2d 564 (Ala. 1980).

As to due process requirements of attorney disciplinary proceedings, see [Am. Jur. 2d, Attorneys at Law § 105](#).

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## 16B Am. Jur. 2d Constitutional Law § 634

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

###### a. Meaning and Import of Property and Property Rights

## § 634. Particular property rights in context of constitutionally guaranteed property rights

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### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1111

An owner cannot be deprived of any of the essential attributes which belong to the right of property.<sup>1</sup> Included within the right of property which is constitutionally protected are the rights to acquire,<sup>2</sup> possess,<sup>3</sup> hold, enjoy,<sup>4</sup> use,<sup>5</sup> manage,<sup>6</sup> insure,<sup>7</sup> defend and protect,<sup>8</sup> and improve<sup>9</sup> property, and the right to devote property to any legitimate use.<sup>10</sup> Indeed, the substantial value of property lies in its use; if the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right.<sup>11</sup> The constitutional right to acquire, possess, and protect property is not limited to any particular amount of property.<sup>12</sup>

A very important incident of the right of property is the right to dispose of it.<sup>13</sup> The right to buy, sell, barter, and exchange property is a necessary incident to its ownership and, subject to reasonable regulation, is as much protected by the constitution as is the ownership itself;<sup>14</sup> similarly protected is the right to enter into contracts in relation to property.<sup>15</sup> However, the right to will or inherit property usually has been held not be a constitutionally protected property right.<sup>16</sup>

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### Footnotes

- 1 Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848 (1904); Wright v. Hart, 182 N.Y. 330, 75 N.E. 404 (1905) (overruled in part on other grounds by, Klein v. Maravelas, 219 N.Y. 383, 114 N.E. 809 (1916)).
- 2 Cap F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S.W.2d 993, 68 A.L.R. 1018 (1929); State v. City of Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307 (1929); Scottish American Mortg. Co. v. Minidoka County, 47 Idaho 33, 272 P. 498, 65 A.L.R. 663 (1928); Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223 (Iowa 2018); Kenton & Campbell Benev. Burial Ass'n v. Goodpaster, 304 Ky. 233, 200 S.W.2d 120 (1946); Malone v. City of Omaha, 294 Neb. 516, 883 N.W.2d 320 (2016); Loundsbury v. City of Keene, 122 N.H. 1006, 453 A.2d 1278 (1982); Appeal of Perrin, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912 (1931).
- 3 Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation, Washington, 484 F.2d 200 (9th Cir. 1973); Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223 (Iowa 2018); Loundsbury v. City of Keene, 122 N.H. 1006, 453 A.2d 1278 (1982).
- 4 Sterling v. Constantin, 287 U.S. 378, 53 S. Ct. 190, 77 L. Ed. 375 (1932); Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223 (Iowa 2018); Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319 (Mo. 2015); Grondin v. Town of Hinsdale, 122 N.H. 882, 451 A.2d 1299 (1982); City of Akron v. Chapman, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953); Township of Exeter v. Zoning Hearing Bd. of Exeter Tp., 599 Pa. 568, 962 A.2d 653 (2009).
- 5 Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319 (Mo. 2015).
- 6 Schafer v. Haller, 108 Ohio St. 322, 1 Ohio L. Abs. 485, 140 N.E. 517, 30 A.L.R. 1378 (1923).
- 7 Kusnetzky v. Security Ins. Co., 313 Mo. 143, 281 S.W. 47, 45 A.L.R. 189 (1926).
- 8 Kentucky Fried Chicken of Cal., Inc. v. Superior Court, 14 Cal. 4th 814, 59 Cal. Rptr. 2d 756, 927 P.2d 1260 (1997); Loundsbury v. City of Keene, 122 N.H. 1006, 453 A.2d 1278 (1982); State v. Webber, 85 Or. App. 347, 736 P.2d 220 (1987); Sammons v. American Auto. Ass'n, 912 P.2d 1103 (Wyo. 1996).
- 9 White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 P. 497 (1911).
- 10 State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A.L.R. 654 (1928); Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); City of Akron v. Chapman, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).
- 11 City of Akron v. Chapman, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).
- 12 Hamilton v. Williams, 145 Fla. 697, 200 So. 80 (1941).
- 13 Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); Malone v. City of Omaha, 294 Neb. 516, 883 N.W.2d 320 (2016) (right to sell); National City Bank of New York v. Del Sordo, 16 N.J. 530, 109 A.2d 631 (1954); City of Akron v. Chapman, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).
- 14 Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943).  
An individual's right to dispose of private property is subject to reasonable statutory restrictions and the reasonable exercise of the police power. Lakeside Imports, Inc. v. State, 639 So. 2d 253 (La. 1994).
- 15 § 640.
- 16 Am. Jur. 2d, Wills § 48.

## 16B Am. Jur. 2d Constitutional Law § 635

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

###### a. Meaning and Import of Property and Property Rights

## § 635. What is a deprivation of constitutionally guaranteed property rights

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### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1111

### A.L.R. Library

[Validity and construction of law regulating conversion of rental housing to condominiums, 21 A.L.R.4th 1083](#)

Both state and Federal Constitutions preclude the government from asserting summary authority over the property of persons, and any deprivation of property must be accomplished in accordance with due process of law.<sup>1</sup> Although the United States Constitution does not contain any definition of the word "deprive" as used in the 14th Amendment, because the constitutionally protected right of property is not unlimited,<sup>2</sup> it follows as a matter of fundamental logic that not every regulation of the right<sup>3</sup> and not every act affecting the right<sup>4</sup> amounts to a deprivation. The failure to give notice when none is required by constitution or statute is not, normally, a denial of due process, nor is it the deprivation of any of the bundle of rights incident to the ownership of private property.<sup>5</sup> The retroactive application of a social security benefit change which reduces benefits for retirees who earn both covered and noncovered wages does not constitute an unconstitutional deprivation of property.<sup>6</sup> Burdens and expenses may within reasonable and constitutional limits be imposed on property,<sup>7</sup> and emergency invasions or limitations of

the use of property have been sustained.<sup>8</sup> However, the concept of "confiscation" of private property is at odds with the Due Process Clause of the Fifth Amendment.<sup>9</sup> Property rights are unwarrantedly infringed by requiring them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communications exist because such accommodation diminishes property rights without significantly enhancing the asserted right of free speech.<sup>10</sup> Thus, a law is considered as being a deprivation of property within the meaning of this constitutional guarantee if it deprives an owner of one of its essential attributes;<sup>11</sup> destroys or impairs its value;<sup>12</sup> restricts or interrupts its common, necessary, or profitable use;<sup>13</sup> hampers the owner in the application of it to the purposes of trade; or imposes conditions upon the right to hold or use it and thereby seriously impairs its value.<sup>14</sup> The imposition of unreasonable conditions upon the use of property is an unconstitutional deprivation because it deprives the owner of his or her property, even without any actual taking.<sup>15</sup> Any significant taking of property by the state is within the purview of the Due Process Clause of the 14th Amendment;<sup>16</sup> as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.<sup>17</sup>

The duration of any potentially wrongful deprivation of a property interest under a state's procedures is an important factor in assessing the impact of official action on the private interest involved for purposes of determining the process due under the Due Process Clause of the 14th Amendment,<sup>18</sup> but it is not decisive of the basic right to a prior hearing of some kind.<sup>19</sup> A temporary, nonfinal deprivation of property is a "deprivation" in the terms of the 14th Amendment.<sup>20</sup>

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#### Footnotes

- 1 [People v. Braden, 243 Ill. App. 3d 671, 183 Ill. Dec. 312, 611 N.E.2d 575 \(2d Dist. 1993\).](#)
- 2 [§ 630.](#)
- 3 [Garelick v. Sullivan, 987 F.2d 913 \(2d Cir. 1993\); Taunton Greyhound Ass'n, Inc. v. Town of Dighton, 373 Mass. 60, 364 N.E.2d 1234 \(1977\); City of Kansas City v. Hertz Corp., 499 S.W.2d 449 \(Mo. 1973\); Nolden v. East Cleveland City Commission, 12 Ohio Misc. 205, 41 Ohio Op. 2d 291, 232 N.E.2d 421 \(C.P. 1966\).](#)  
A county ordinance prohibiting residents from keeping more than four roosters on a property without a permit was a valid exercise of the county's police power and did not violate the residents' right to possess property; the ordinance did not deprive residents of the right to own property, but rather regulated their use of it. [Perez v. County of Monterey, 32 Cal. App. 5th 257, 243 Cal. Rptr. 3d 683 \(6th Dist. 2019\).](#)
- 4 [U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 \(1993\); N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226, 69 S. Ct. 541, 93 L. Ed. 638 \(1949\); McAndrews v. Fleet Bank of Massachusetts, N.A., 989 F.2d 13 \(1st Cir. 1993\); L.M. Everhart Const., Inc. v. Jefferson County Planning Com'n, 2 F.3d 48 \(4th Cir. 1993\); Chacon v. Granata, 515 F.2d 922 \(5th Cir. 1975\); Thrasher v. Barrick, 986 F.2d 1246, 1 A.D.D. 737 \(8th Cir. 1993\); Housing Authority of City of Fort Collins v. U.S., 980 F.2d 624 \(10th Cir. 1992\); Blankman v. County of Nassau, 819 F. Supp. 198 \(E.D. N.Y. 1993\), \*aff'd\*, 14 F.3d 592 \(2d Cir. 1993\); State v. Lewis, 406 A.2d 886 \(Me. 1979\).](#)  
A motel owner-operator is not deprived of property under the [U.S. Const. Amend. V](#) by the loss of his "right" to select his guests free from governmental regulation by the Civil Rights Act of 1964, which forbids discrimination or segregation on the grounds of race, color, religion, or national origin in certain places of public accommodation affecting commerce. [Heart of Atlanta Motel, Inc. v. U. S., 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 \(1964\).](#)
- 5 [Evans v. Burruss, 401 Md. 586, 933 A.2d 872 \(2007\).](#)
- 6 [Fernandez v. Barnhart, 200 Fed. Appx. 325 \(5th Cir. 2006\).](#)
- 7 [§ 388.](#)
- 8 [Block v. Hirsh, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A.L.R. 165 \(1921\).](#)
- 9 [Zschemig v. Miller, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 \(1968\).](#)  
The Federal Constitution protects against the confiscation of private property or the income therefrom. [Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 \(1972\).](#)

- 10 Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972).
- 11 Indian Refining Co. v. Ambraw River Drainage Dist., 1 F. Supp. 937 (E.D. Ill. 1932); Capital Gas & Electric Co. v. Boynton, 137 Kan. 717, 22 P.2d 958 (1933); State v. Johnson, 265 A.2d 711, 46 A.L.R.3d 1414 (Me. 1970); Henderson v. City of Greenwood, 172 S.C. 16, 172 S.E. 689 (1934); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930); Inman v. Sandvig, 170 Wash. 112, 15 P.2d 696 (1932).
- 12 State v. Johnson, 265 A.2d 711, 46 A.L.R.3d 1414 (Me. 1970); Henderson v. City of Greenwood, 172 S.C. 16, 172 S.E. 689 (1934); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930); Inman v. Sandvig, 170 Wash. 112, 15 P.2d 696 (1932).
- 13 C. F. Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. 1974); State v. Johnson, 265 A.2d 711, 46 A.L.R.3d 1414 (Me. 1970).

The rezoning of buildable private parks exclusively as parks open to the public, through the device of floating development rights severed from real property and made transferable to another section of mid-Manhattan, constituted a deprivation of property rights without due process of law. Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).
- 14 East Coast Lumber Terminal v. Town of Babylon, 174 F.2d 106, 8 A.L.R.2d 1219 (2d Cir. 1949); State v. Johnson, 265 A.2d 711, 46 A.L.R.3d 1414 (Me. 1970); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930); Inman v. Sandvig, 170 Wash. 112, 15 P.2d 696 (1932).
- 15 East Coast Lumber Terminal v. Town of Babylon, 174 F.2d 106, 8 A.L.R.2d 1219 (2d Cir. 1949).
- 16 North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 17 Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).
- 18 Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).
- 19 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 20 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); City of Norwood v. Sheen, 126 Ohio St. 482, 186 N.E. 102, 87 A.L.R. 1375 (1933); State ex rel. Payne v. Walden, 156 W. Va. 60, 190 S.E.2d 770 (1972).

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## 16B Am. Jur. 2d Constitutional Law § 636

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### b. Rights as to Destruction of Property

## § 636. Rights as against destruction of property, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109

### A.L.R. Library

[Validity and construction of statute or ordinance providing for repair or destruction of residential building by public authorities at owner's expense, 43 A.L.R.3d 916](#)

The state or federal government, under the police power, may order the destruction of private property in a proper case.<sup>1</sup> A reasonable regulation under the police power is not a violation of the due process guarantee, even though property in whole or in part is taken or destroyed,<sup>2</sup> without compensation.<sup>3</sup>

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### Footnotes

<sup>1</sup> [Miller v. Schoene, 276 U.S. 272, 48 S. Ct. 246, 72 L. Ed. 568 \(1928\); City of Shreveport v. Kansas City, S. & G. Ry. Co., 167 La. 771, 120 So. 290, 62 A.L.R. 1512 \(1929\).](#)

As to interference with property rights by means of exercise of police power, see §§ [383](#) to [388](#).

[2](#) [Terrace v. Thompson](#), 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923).

Allegations that city violated a vessel owner's substantive due process rights with the city's cleanup program, which identified boats considered ugly and seized and destroyed those boats without giving their owners notice or an opportunity to contest their removal or destruction, failed to state a substantive due process violation against the city and city marine patrol officers. [Hoefling v. City of Miami](#), 811 F.3d 1271, 93 Fed. R. Serv. 3d 1022 (11th Cir. 2016).

[3](#) [Pennsylvania R. Co. v. Ewing](#), 241 Pa. 581, 88 A. 775 (1913).

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## 16B Am. Jur. 2d Constitutional Law § 637

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### b. Rights as to Destruction of Property

## § 637. Notice and hearing in connection with seizure and destruction of property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109, 1111, 4097

### A.L.R. Library

[Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395](#)

Where necessary to ensure the public safety, the legislature may under its police power authorize municipal authorities summarily to seize and destroy property without legal process or previous notice to the owner.<sup>1</sup> So far as property is dangerous to the safety or health of the community, due process of law may authorize its summary seizure and destruction.<sup>2</sup> However, in any case in which the property may have a lawful use or in which a fair question arises as to whether the property is such as should be seized or destroyed, a notice and hearing are necessary.<sup>3</sup> Property which is inoffensive and harmless can be condemned or destroyed only by legal proceedings with due notice to the owner.<sup>4</sup>



Private property enjoys no constitutional privilege when it is knowingly used to defy a state's criminal laws.<sup>5</sup> With respect to the necessity of affording a notice or hearing before destroying or seizing property used for an unlawful purpose, a distinction has been drawn between property which may be innocently used and that which is incapable of any except an illegal use. While in the exercise of the police power the legislature has authority to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize it to be abated summarily, if property which is innocent in its ordinary and proper use has been used for an unlawful purpose, it is beyond the power of the legislature to order its summary forfeiture to the state as a penalty or punishment for such unlawful use without giving its owner an opportunity for a hearing.<sup>6</sup>

There is no constitutional objection to enforcing a penalty by forfeiture of the offending article.<sup>7</sup> Some articles may be incapable of any lawful use and the legislature may make the mere possession of them illegal. In this class fall burglars' tools, counterfeiting outfits, obscene pictures or prints, gaming tables, and slot machines.<sup>8</sup> Statutes may authorize their seizure and forfeiture without in any way violating constitutional provisions prohibiting the deprivation of property without due process of law.<sup>9</sup>

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#### Footnotes

- 1 [Rowland v. State ex rel. Martin](#), 129 Fla. 662, 176 So. 545, 114 A.L.R. 443 (1937).
- 2 [Samuels v. McCurdy](#), 267 U.S. 188, 45 S. Ct. 264, 69 L. Ed. 568, 37 A.L.R. 1378 (1925); [Spagnuolo v. Bonnet](#), 16 N.J. 546, 109 A.2d 623 (1954).
- 3 [U.S. v. James Daniel Good Real Property](#), 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993); [Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Mo.](#), 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961); [Bloem v. Unknown Dept. of the Interior Employees](#), 920 F. Supp. 2d 154 (D.D.C. 2013). Hearings on property rights, generally, see § 992.
- 4 [Proper v. District of Columbia](#), 948 F.2d 1327 (D.C. Cir. 1991); [Walker v. Johnson County](#), 209 N.W.2d 137 (Iowa 1973); [Spagnuolo v. Bonnet](#), 16 N.J. 546, 109 A.2d 623 (1954).
- 5 [One 1982 Datsun 280ZX, VIN No. JNICZ0456CX625757, Arkansas License No. IXK 624 v. Bentley ex rel. North Little Rock Police Dept.](#), 285 Ark. 121, 685 S.W.2d 498 (1985).  
The Fourth Amendment protects the sanctity of a home, but when a home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, the residence is not entitled to the same degree of sanctity. [U.S. v. Davis](#), 646 F.2d 1298 (8th Cir. 1981).
- 6 [U.S. v. James Daniel Good Real Property](#), 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).
- 7 [Am. Jur. 2d, Forfeitures and Penalties § 15](#).  
As to the civil or criminal forfeiture or condemnation of property under statutes dealing with the possession or distribution of controlled substances, generally, see [Am. Jur. 2d, Drugs and Controlled Substances §§ 221 to 246](#).
- 8 [Brown v. State, Through Dept. of Public Safety, Division of Louisiana State Police](#), 392 So. 2d 415 (La. 1980).
- 9 [J.B. Mullen & Co. v. Mosley](#), 13 Idaho 457, 90 P. 986 (1907); [Frost v. People](#), 193 Ill. 635, 61 N.E. 1054 (1901); [Woods v. Cottrell](#), 55 W. Va. 476, 47 S.E. 275 (1904).

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## 16B Am. Jur. 2d Constitutional Law § 638

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### c. Rights as to Business or Occupation

## § 638. Property rights in business or occupation, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109, 1114

A person's business, occupation, or calling is "property" within the meaning of the constitutional provisions as to due process of law.<sup>1</sup> The right to earn a livelihood by following the ordinary occupations of life is constitutionally protected;<sup>2</sup> such protection is particularly found in the guarantees of the 14th Amendment.<sup>3</sup> Some authority describes the right as fundamental,<sup>4</sup> or at least nontrivial,<sup>5</sup> natural,<sup>6</sup> inherent,<sup>7</sup> and inalienable,<sup>8</sup> and as one of the most sacred<sup>9</sup> and most valuable rights of a citizen.<sup>10</sup> However, other authority describes the right to pursue a lawful occupation as a nonfundamental right<sup>11</sup> guaranteed under a state constitution's inherent rights provision.<sup>12</sup>

The constitutional guarantee of the right of property protects a person's business, occupation, or calling not only from confiscation by legislative edicts<sup>13</sup> but also from any unjustifiable impairment or abridgment.<sup>14</sup> The right to continue engaging in a lawful profession, once obtained, cannot be arbitrarily taken from United States citizens, any more than their real or personal property can be thus taken.<sup>15</sup> The right to employment is a protected interest subject to rational basis review;<sup>16</sup> state regulation that deprives an individual of his right to pursue a lawful occupation must be supported by a showing that the deprivation is reasonably related to the state interest sought to be protected.<sup>17</sup>

Individual businesses, occupations, or callings are also included in the right to liberty<sup>18</sup> and the pursuit of happiness.<sup>19</sup>

The right of a person to pursue a calling, consistent with proper and reasonable police regulations which the particular situation may sanction,<sup>20</sup> cannot be taken away by legislative enactment.<sup>21</sup> The common businesses and callings of life, the ordinary trades and pursuits which are innocent in themselves and which have been followed in all communities from time immemorial, must therefore be free in the United States to all alike upon the same terms.<sup>22</sup> Any person is at liberty to pursue any lawful calling,<sup>23</sup> although he or she may not be allowed to practice it in any place he or she sees fit.<sup>24</sup>

The right of an individual to engage in a lawful business may not be arbitrarily denied to him or her and granted to another under the guise of regulation.<sup>25</sup> The right of pursuing an ordinary calling or trade and of acquiring, holding, and selling property also embraces the right to make all proper contracts in relation thereto.<sup>26</sup> An individual also is free to choose to close down and discontinue the operation of his or her business.<sup>27</sup>

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## Footnotes

- 1 Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); Wooten v. Clifton Forge School Bd., 655 F.2d 552 (4th Cir. 1981); Gosney v. Sonora Independent School Dist., 603 F.2d 522 (5th Cir. 1979); City of Texarkana v. Brachfield, 207 Ark. 774, 183 S.W.2d 304 (1944); Laney v. Holbrook, 150 Fla. 622, 8 So. 2d 465, 146 A.L.R. 202 (1942); O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401, 9 A.L.R.2d 1031 (1949); Mongogna v. O'Dwyer, 204 La. 1030, 16 So. 2d 829, 152 A.L.R. 162 (1943); City of Akron v. Chapman, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953); Clayton v. Bennett, 5 Utah 2d 152, 298 P.2d 531 (1956).
- 2 Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); City of Tucson v. Stewart, 45 Ariz. 36, 40 P.2d 72, 96 A.L.R. 1492 (1935); Kenton & Campbell Benev. Burial Ass'n v. Goodpaster, 304 Ky. 233, 200 S.W.2d 120 (1946); Malone v. City of Omaha, 294 Neb. 516, 883 N.W.2d 320 (2016); City of Seattle v. Proctor, 183 Wash. 293, 48 P.2d 238 (1935) (abrogated on other grounds by, Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019)).  
The right to practice one's profession is a fundamental vested right. Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services, 209 Cal. App. 4th 445, 147 Cal. Rptr. 3d 173 (2d Dist. 2012). As to the right to pursue a business or occupation as a privilege and immunity of citizenship, see § 801.
- 3 New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S. Ct. 371, 76 L. Ed. 747 (1932).
- 4 Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brands Intern. Inc., 616 F. Supp. 2d 805 (N.D. Ill. 2009), on reconsideration in part, (May 13, 2009) (under Illinois law); Rivera-Cartagena v. Wal-Mart Puerto Rico, Inc., 802 F. Supp. 2d 324 (D.P.R. 2011) (under Puerto Rico law); Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N.W.2d 57, 145 A.L.R. 1158 (1943); Montana Cannabis Industry Ass'n v. State, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161 (2012).
- 5 Muratti-Stuart v. Department of Business and Professional Regulation, 174 So. 3d 538 Fla. 4th DCA 2015.
- 6 Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); In re Leach, 134 Ind. 665, 34 N.E. 641 (1893).
- 7 Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); Fiscal Court of Owen County v. F. & A. Cox Co., 132 Ky. 738, 117 S.W. 296 (1909).
- 8 Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); Frazer v. Shelton, 320 Ill. 253, 150 N.E. 696, 43 A.L.R. 1086 (1926); King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315 (Pa. Commw. Ct. 2018).
- 9 Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); Schnaier v. Navarre Hotel & Importation Co., 182 N.Y. 83, 74 N.E. 561 (1905).
- 10 Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); City of Seattle v. Proctor, 183 Wash. 293, 48 P.2d 238 (1935) (abrogated on other grounds by, Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019)).
- 11 Driscoll v. Corbett, 620 Pa. 494, 69 A.3d 197 (2013).

- 12 Ladd v. Real Estate Commission of Commonwealth, 187 A.3d 1070 (Pa. Commw. Ct. 2018).
- 13 Keller v. City of Council Bluffs, 246 Iowa 202, 66 N.W.2d 113, 51 A.L.R.2d 251 (1954); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).
- 14 Prior v. White, 132 Fla. 1, 180 So. 347, 116 A.L.R. 1176 (1938); State v. Union Oil Co. of Me., 151 Me. 438, 120 A.2d 708 (1956); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).
- 15 Robinson v. Huerta, 123 F. Supp. 3d 30 (D.D.C. 2015).
- 16 Amunrud v. Board of Appeals, 158 Wash. 2d 208, 143 P.3d 571, 30 A.L.R.6th 775 (2006) (abrogated on other grounds by, Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019)).
- 17 King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315 (Pa. Commw. Ct. 2018).
- 18 § 616.
- 19 § 607.
- 20 §§ 355 to 361.
- 21 New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S. Ct. 371, 76 L. Ed. 747 (1932); Connor v. Chanhassen Tp., 249 Minn. 205, 81 N.W.2d 789 (1957).
- 22 Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); Cap F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S.W.2d 993, 68 A.L.R. 1018 (1929); Frazer v. Shelton, 320 Ill. 253, 150 N.E. 696, 43 A.L.R. 1086 (1926); People ex rel. Stafford v. Travis, 231 N.Y. 339, 132 N.E. 109, 15 A.L.R. 1319 (1921).
- 23 People v. Victor, 287 Mich. 506, 283 N.W. 666, 124 A.L.R. 316 (1939); Woolf v. Fuller, 87 N.H. 64, 174 A. 193, 94 A.L.R. 1067 (1934).
- 24 Hull v. Board of Com'rs of Halifax Hosp. Medical Center, 453 So. 2d 519 (Fla. 5th DCA 1984).
- 25 Flax v. City of Richmond, 189 Va. 273, 52 S.E.2d 250 (1949).
- 26 § 640.
- 27 Friedstrass Co. v. Livingston, 16 Misc. 2d 121, 185 N.Y.S.2d 39 (Sup 1959), *aff'd*, 8 A.D.2d 780, 187 N.Y.S.2d 977 (1st Dep't 1959).

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## 16B Am. Jur. 2d Constitutional Law § 639

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### c. Rights as to Business or Occupation

## § 639. Limitations on property rights in business or occupation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109, 1115 to 1117

Although the legislature is without power to prohibit a legitimate business,<sup>1</sup> the right to a business, occupation, or calling, although constitutionally protected, is not absolute.<sup>2</sup> All businesses and occupations,<sup>3</sup> including lawful callings,<sup>4</sup> are subject to regulation by means of proper exercise of the state's police power.<sup>5</sup> Restrictions and regulations may be imposed within proper limits without in any way impairing the fundamental right to engage in occupations.<sup>6</sup> The liberty to conduct a business so as to injure the public at large or any substantial group is not protected.<sup>7</sup> There is no arbitrary deprivation of a citizen's right to follow a chosen trade where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society.<sup>8</sup> Moreover, there is no constitutional right to pursue a profession in a manner that infringes on the constitutional rights of another citizen.<sup>9</sup>

Regulation of a business which actually results in prohibiting such business does not constitute a "taking" under the Fifth Amendment when the regulation promotes the health, safety, welfare, or morals of the community and thus is a valid exercise of the police powers; as long as the police power is validly exercised, even a previously lawful business may be prohibited.<sup>10</sup> Moreover, the 14th Amendment does not protect a business against the hazards of competition,<sup>11</sup> with the result that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, and compete with private interests engaged in a like activity.<sup>12</sup> States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as they do not run afoul of some specific

federal constitutional prohibition, or of some valid federal law.<sup>13</sup> States have authority to regulate a profession, and doing so does not violate any property right.<sup>14</sup>

Under some authority, a state constitutional provision intended to echo United States Declaration of Independence by providing that all persons are created equal and endowed by their Creator with certain inalienable rights, among them life, liberty, enjoyment of fruits of their own labor, and pursuit of happiness does not create a constitutionally protected interest in a particular job.<sup>15</sup>

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#### Footnotes

- 1 [Brackman v. Kruse](#), 122 Mont. 91, 199 P.2d 971 (1948).
- 2 [Rivera-Cartagena v. Wal-Mart Puerto Rico, Inc.](#), 802 F. Supp. 2d 324 (D.P.R. 2011).
- 3 §§ 355 to 361.
- 4 §§ 357, 358.
- 5 [National Fertilizer Ass'n v. Bradley](#), 301 U.S. 178, 57 S. Ct. 748, 81 L. Ed. 990 (1937).
- 6 [People ex rel. Armstrong v. Warden of City Prison of New York](#), 183 N.Y. 223, 76 N.E. 11 (1905).
- 7 [Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); [Mayflower Farms v. Baldwin](#), 267 N.Y. 9, 195 N.E. 532 (1935), *rev'd on other grounds*, 297 U.S. 266, 56 S. Ct. 457, 80 L. Ed. 675 (1936).
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- 9 [U.S. v. Aldawsari](#), 683 F.3d 660, 82 Fed. R. Serv. 3d 1074 (5th Cir. 2012).
- 10 [Kuban v. McGimsey](#), 96 Nev. 105, 605 P.2d 623 (1980).
- 11 [Hegeman Farms Corporation v. Baldwin](#), 293 U.S. 163, 55 S. Ct. 7, 79 L. Ed. 259 (1934); [Seattle Gas Co. v. City of Seattle, Wash.](#), 291 U.S. 638, 54 S. Ct. 550, 78 L. Ed. 1037 (1934); [Puget Sound Power & Light Co. v. City of Seattle, Wash.](#), 291 U.S. 619, 54 S. Ct. 542, 78 L. Ed. 1025 (1934); [Jackson Sawmill Co., Inc. v. U.S.](#), 580 F.2d 302 (8th Cir. 1978).
- 12 [Seattle Gas Co. v. City of Seattle, Wash.](#), 291 U.S. 638, 54 S. Ct. 550, 78 L. Ed. 1037 (1934); [Puget Sound Power & Light Co. v. City of Seattle, Wash.](#), 291 U.S. 619, 54 S. Ct. 542, 78 L. Ed. 1025 (1934); [City of Boston v. Jackson](#), 260 U.S. 309, 43 S. Ct. 129, 67 L. Ed. 274 (1922).
- 13 [Ferguson v. Skrupa](#), 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963); [Colorado Springs Amusements, Ltd. v. Rizzo](#), 524 F.2d 571 (3d Cir. 1975).
- 14 [Tucker v. State Dept. of Public Health](#), 650 So. 2d 910 (Ala. Civ. App. 1994).
- 15 [Munn-Goins v. Board of Trustees of Bladen Community College](#), 658 F. Supp. 2d 713, 251 Ed. Law Rep. 735 (E.D. N.C. 2009), *aff'd*, 393 Fed. Appx. 74 (4th Cir. 2010).

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## 16B Am. Jur. 2d Constitutional Law § 640

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### d. Rights of Contract

## § 640. Freedom of contract, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109

Although the term "freedom of contract" does not appear in the United States Constitution, and has been described as an abstract doctrine,<sup>1</sup> it is nonetheless a part of the liberty protected by the Due Process Clauses of the Fifth and 14th Amendments.<sup>2</sup>

### Observation:

The section of the Federal Constitution which provides that no state shall pass any law impairing the obligation of contracts<sup>3</sup> restricts the states from passing laws which affect existing contractual obligations but does not create a specific constitutional right to freedom of contract.<sup>4</sup>

The freedom to contract is also safeguarded by the constitutions of most of the states.<sup>5</sup>

The liberty guaranteed by the Due Process Clause of the 14th Amendment embraces the right to enter into all contracts proper, necessary, and essential to the carrying out of the purpose of a lawful calling.<sup>6</sup> Absent a statutory prohibition or some other public policy impediment, the very essence of freedom of contract is the right of the parties to strike both good bargains and bad bargains.<sup>7</sup> A trader or manufacturer engaged in an entirely private business has the right freely to exercise its own independent discretion as to parties with whom it will deal.<sup>8</sup> Thus, for example, unless there are contrary statutory provisions, manufacturers are free to enter into franchise agreements for distribution of their products as they see fit.<sup>9</sup> The parties to a contract have the right to make contractual provisions among themselves and the courts will not limit this freedom to contract except under certain situations, such as the provision being against public policy, made under fraud or duress, and other considerations where the court in a legal proceeding has before it the unreasonableness of the contract provision.<sup>10</sup> The freedom of contract also entails the freedom not to contract, except in the case of innkeepers, common carriers, and certain other public service companies, and except as restricted by antitrust, antidiscrimination, and other applicable statutes.<sup>11</sup>

**Observation:**

Any impairment of the right to contract must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation.<sup>12</sup>

Included in the right of personal liberty and the right to private property is the right to make contracts for the acquisition of property.<sup>13</sup>

The privilege of contracting is both a liberty and a property right.<sup>14</sup> The right to contract, freedom of contract, or liberty of contract exist as a necessary inference from, or corollary to, the express constitutional guarantee of rights of property.<sup>15</sup> Likewise, the right of a citizen of the United States resident in one state to contract in another is also a privilege protected by the Privileges and Immunities Clause of the 14th Amendment.<sup>16</sup>

While the freedom to contract is not absolute<sup>17</sup> and is subject to limitations,<sup>18</sup> within such limitations all parties are free to make whatever contracts they please, so long as no fraud or deception is practiced and the contract is legal in all respects.<sup>19</sup> This right extends to business entities.<sup>20</sup>

Valid contracts have the status of property for the purpose of the guarantee of due process of law<sup>21</sup> and as such are protected from being taken without just compensation, whether the obligor is a private individual, a municipality, a state, or the United States.<sup>22</sup>

The liberty of contract guaranteed by the constitution is freedom from arbitrary or unreasonable restraint, but it is not absolute; liberty of contract is subject to the restraints of due process.<sup>23</sup> Public policy strongly favors the freedom to contract as is manifest in both the United States and state constitutions.<sup>24</sup> Ordinarily, sui juris persons are free to contract as they wish with respect to their property rights, and a court will not annul their agreement unless the agreement is contrary to law.<sup>25</sup>



On the question whether the liberty to contract is a fundamental right, the courts are not in agreement. Some courts have stated that the liberty is not to be so characterized,<sup>26</sup> and those courts have noted that the right of liberty of contract differs from a fundamental constitutional right, from the right of liberty of the body or person, from the right of property, including the obligation of existing contracts, from the right of equality, and from the right of political liberty, in that it is not a vested right, a right of definite content, or a right protected by specific constitutional guarantees.<sup>27</sup> Other courts have held that liberty of contract is a fundamental right.<sup>28</sup>

The rights of pursuing an ordinary calling or trade<sup>29</sup> and of acquiring, holding, and selling property<sup>30</sup> embrace the right to make all proper contracts in relation thereto.<sup>31</sup> There is no legal or equitable right requiring a party to involuntarily contract with another party.<sup>32</sup>

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#### Footnotes

- 1 [People v. Perretta, 253 N.Y. 305, 171 N.E. 72, 84 A.L.R. 636 \(1930\).](#)
- 2 [§ 615.](#)
- 3 [U.S. Const. Art. I, § 10, cl. 1.](#)
- 4 [Bowman v. Township of Pennsauken, 709 F. Supp. 1329 \(D.N.J. 1989\).](#)
- 5 [City of Tucson v. Stewart, 45 Ariz. 36, 40 P.2d 72, 96 A.L.R. 1492 \(1935\); Desandolo v. F & C Tractor & Equipment Co., 211 So. 2d 576 \(Fla. 4th DCA 1968\); In re Opinion of the Justices, 271 Mass. 598, 171 N.E. 234, 68 A.L.R. 1265 \(1930\); Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N.J. Eq. 146, 172 A. 551, 92 A.L.R. 1450 \(Ct. Err. & App. 1934\); Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8, 70 A.L.R.2d 408 \(1958\); Crouch v. Central Labor Council of Portland and Vicinity, 134 Or. 612, 293 P. 729, 83 A.L.R. 193 \(1930\); State v. Memorial Gardens Development Corp., 143 W. Va. 182, 101 S.E.2d 425, 68 A.L.R.2d 1233 \(1957\).](#)
- 6 [Northwestern Nat. Life Ins. Co. v. Riggs, 203 U.S. 243, 27 S. Ct. 126, 51 L. Ed. 168 \(1906\).](#)
- 7 [Gray v. American Exp. Co., 743 F.2d 10 \(D.C. Cir. 1984\).](#)
- 8 [Reeves, Inc. v. Stake, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 \(1980\).](#)
- 9 [McDonald's Corp. v. Markim, Inc., 209 Neb. 49, 306 N.W.2d 158 \(1981\).](#)
- 10 [Mississippi Hill & Delta Sav. & Loan Ass'n v. Valley Bank, 392 So. 2d 1126 \(Miss. 1981\).](#)
- 11 [Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass'n, 110 F.3d 318, 1997 FED App. 0101P \(6th Cir. 1997\).](#)
- 12 [Porubiansky v. Emory University, 156 Ga. App. 602, 275 S.E.2d 163 \(1980\), judgment aff'd, 248 Ga. 391, 282 S.E.2d 903 \(1981\).](#)
- 13 [Florida Accountants Ass'n v. Dandelake, 98 So. 2d 323, 70 A.L.R.2d 425 \(Fla. 1957\).](#)
- 14 [Ohio Valley Gas, Inc. v. Blackburn, 445 N.E.2d 1378 \(Ind. Ct. App. 1983\).](#)  
[A city ordinance which prohibited the sale of pasteurized milk within the municipality unless the milk had been pasteurized in a plant located within municipal limits was held to violate the constitutional rights of property and contract of one whose milk plant was located outside the city. Gustafson v. City of Ocala, 53 So. 2d 658 \(Fla. 1951\).](#)
- 15 [Direct Plumbing Supply Co. v. City of Dayton, 138 Ohio St. 540, 21 Ohio Op. 422, 38 N.E.2d 70, 137 A.L.R. 1058 \(1941\).](#)
- 16 [§ 803.](#)
- 17 [Midwest Messenger Ass'n v. Spire, 223 Neb. 748, 393 N.W.2d 438, 78 A.L.R.4th 469 \(1986\); Hall v. Farmers Ins. Exchange, 1985 OK 40, 713 P.2d 1027 \(Okla. 1985\).](#)
- 18 [§§ 642 to 644.](#)
- 19 [Prudential Ins. Co. of America v. Prescott, 130 Fla. 11, 176 So. 875 \(1937\); Hall v. Skate Escape, Ltd., 171 Ga. App. 178, 319 S.E.2d 67 \(1984\); Southern States Equipment Co., Inc. v. Jack Legett Co., Inc., 379 So.](#)

2d 881 (La. Ct. App. 4th Cir. 1980), writ denied, 381 So. 2d 1232 (La. 1980); *Com. v. Stock*, 346 Pa. Super. 60, 499 A.2d 308 (1985).

Parties should be free to contract for any lawful purpose upon such terms and conditions as they believe to be in their mutual interest. *Hall v. Farmers Ins. Exchange*, 1985 OK 40, 713 P.2d 1027 (Okla. 1985).

Parties may contract as they choose so long as what they agree to is not forbidden by law or against public policy. *Chesapeake and Potomac Telephone Co. of Virginia v. Sisson and Ryan, Inc.*, 234 Va. 492, 362 S.E.2d 723 (1987).

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21 *N.H. Lyons & Co. v. Corsi*, 3 N.Y.2d 928, 167 N.Y.S.2d 945, 145 N.E.2d 885 (1957).

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24 *McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp.*, 95 Ill. 2d 68, 69 Ill. Dec. 183, 447 N.E.2d 400 (1983).

25 *Whitmore & Arnold, Inc. v. Lucquet*, 233 Va. 106, 353 S.E.2d 764, 3 U.C.C. Rep. Serv. 2d 308 (1987).

26 *Jack A. Parker & Associates, Inc. v. State Through Dept. of Civil Service*, 454 So. 2d 162 (La. Ct. App. 1st Cir. 1984), writ denied, 459 So. 2d 538 (La. 1984); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102 (Minn. Ct. App. 1987) (the freedom to contract is not a fundamental right; thus, minimum judicial scrutiny or the rational basis test is appropriate).

27 *State v. Gateway Mortuaries*, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512 (1930).

28 *Florida Accountants Ass'n v. Dandelake*, 98 So. 2d 323, 70 A.L.R.2d 425 (Fla. 1957); *Payette Lakes Protective Ass'n v. Lake Reservoir Co.*, 68 Idaho 111, 189 P.2d 1009 (1948); *Alford v. Textile Ins. Co.*, 248 N.C. 224, 103 S.E.2d 8, 70 A.L.R.2d 408 (1958); *Blount v. Smith*, 12 Ohio St. 2d 41, 41 Ohio Op. 2d 250, 231 N.E.2d 301 (1967).

29 § 638.

30 § 634.

31 *Chicago, R.I. & P. Ry. Co. v. U.S.*, 284 U.S. 80, 52 S. Ct. 87, 76 L. Ed. 177 (1931); *Taylor v. Lexington Water Power Co.*, 165 S.C. 120, 163 S.E. 137 (1932); *State v. Nuss*, 79 S.D. 522, 114 N.W.2d 633 (1962); *Bountiful City v. De Luca*, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).

32 *Ohio University Faculty Ass'n v. Ohio University*, 5 Ohio App. 3d 130, 449 N.E.2d 792, 11 Ed. Law Rep. 623 (4th Dist. Athens County 1982).

## 16B Am. Jur. 2d Constitutional Law § 641

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### d. Rights of Contract

## § 641. Exceptions to freedom of contract

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1109

The general rule that all persons possess a liberty of contract guaranteed from interference is subject to a number of exceptions. One of these is that the constitutional protection afforded is not protection against breach of a contract.<sup>1</sup> Additionally, freedom of contract does not operate in behalf of governmental agencies and political subdivisions so as to inhibit the legislature from limiting or prohibiting their right of contract.<sup>2</sup> Likewise, a third exception to the general principle is that the constitutional guarantee of liberty of contract does not apply to children of tender years.<sup>3</sup>

The rule of freedom of contract which prevails as to private contracts is not applicable to contracts in which the public in general has an interest.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Shawnee Sewerage & Drainage Co. v. Stearns](#), 220 U.S. 462, 31 S. Ct. 452, 55 L. Ed. 544 (1911); [Catholic Order of Foresters v. State](#), 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979 (1937).
- <sup>2</sup> [City of Trenton v. State of New Jersey](#), 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471 (1923); [Minot Special School Dist. No. 1 v. Olsness](#), 53 N.D. 683, 208 N.W. 968, 45 A.L.R. 1337 (1926).

As to regulation of contracts in relation to public works, generally, see [Am. Jur. 2d, Public Works and Contracts §§ 2 to 4](#).

3 Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S.W. 887, 12 A.L.R. 1208 (1920); Starnes v. Albion Mfg. Co.,  
147 N.C. 556, 61 S.E. 525 (1908).

4 J. Aron & Co. v. Panama R. Co., 255 N.Y. 513, 175 N.E. 273 (1931).

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## 16B Am. Jur. 2d Constitutional Law § 642

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### d. Rights of Contract

## § 642. Limitations on freedom of contract

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1112(1)

### A.L.R. Library

[Validity, Construction, and Application of State Statutory Provisions Prohibiting Sale of Gasoline Below Cost, 26 A.L.R.6th 249](#)

The general rule is well settled that freedom of contract is not absolute,<sup>1</sup> unlimited,<sup>2</sup> or universal.<sup>3</sup> Liberty of contract under the Constitution is necessarily subject to the restraints of due process, and a regulation which is reasonable in relation to its subject and is adopted in the interests of the community in due process is entirely proper.<sup>4</sup> Although the general rule of law favors freedom of contract, equally fundamental with the private right to contract is the public's right to exercise its police power and to regulate the private right to contract in the common interest.<sup>5</sup> The right is relative to many conditions of time, place, and circumstance<sup>6</sup> and is subject to reasonable limitations.<sup>7</sup> Without regard to its source, the sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction and will remain intact unless surrendered in unmistakable terms.<sup>8</sup>

In every case where limitations are sought to be imposed, it must be remembered that freedom of contract is the general rule and restraint the exception,<sup>9</sup> and that the exercise of legislative authority to abridge freedom of contract can be justified only by the existence of exceptional circumstances.<sup>10</sup>

Concerning the general nature of the limitations which may be imposed upon the liberty of contract, the Supreme Court has stated that the power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to affect injuriously the public interests; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons.<sup>11</sup> The constitutional right to contract may not be invoked to guarantee a supposed right of one to make or enter into contracts which are illegal and properly forbidden<sup>12</sup> and contracts against public policy.<sup>13</sup> Liberty of contract is not necessarily violated by legislation indirectly operating as a deterrent because it restricts dealings which may have become associated with a contract.<sup>14</sup> Likewise, a statute does not violate the Due Process Clause because it creates a condition of affairs which renders the making of a related contract, lawful in itself, ineffective.<sup>15</sup>

Under state action, the right of contract may, within constitutional limits, be abridged, enlarged, or destroyed. Thus, a state may limit the making of certain contracts within its territory,<sup>16</sup> and it may prohibit and declare invalid the making of certain contracts within its borders,<sup>17</sup> for the 14th Amendment does not guarantee to the citizen the right to make any contract within a state, either directly or indirectly, where the making thereof is constitutionally forbidden by such state.<sup>18</sup> Likewise, a state may require certain mandatory obligations in connection with the contracts involved in contractors' bonds or with other similar matters arising in relation to construction or materialmen's liens.<sup>19</sup>

A statute preventing assignees of claims from filing or prosecuting a claim in the small claims division, as interpreted to prohibit the assignment of small claims judgments, does not interfere with the freedom to contract of assignees of small claims court judgments where, at the time the assignees purchase the small claims judgments from the assignor, an appellate court has already interpreted the term "prosecution," as used in the statute as applying to all stages of the proceedings in the small claims division, and the assignees, who are presumed to know the law, have purchased the small claims judgments at their own peril.<sup>20</sup>

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## Footnotes

- 1 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937); Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); Hartford Accident & Indemnity Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934); Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283, 53 S. Ct. 133, 77 L. Ed. 306, 87 A.L.R. 285 (1932); Stephenson v. Binford, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932); Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940); Midwest Messenger Ass'n v. Spire, 223 Neb. 748, 393 N.W.2d 438, 78 A.L.R.4th 469 (1986); Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941); State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938).
- 2 Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937).
- 3 Highland v. Russell Car & Snowplow Co., 279 U.S. 253, 49 S. Ct. 314, 73 L. Ed. 688 (1929).
- 4 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937).
- 5 Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 662 N.E.2d 1015 (1996).  
Freedom of contract, as guaranteed by both the state and Federal Constitutions, is a qualified right and is subject to the reasonable and legitimate exercise of the police power of the state. Illinois Housing Development Authority v. LaSalle Nat. Bank, 139 Ill. App. 3d 985, 94 Ill. Dec. 15, 487 N.E.2d 772 (2d Dist. 1985).

- Freedom of contract is subject to reasonable restraint by the state, under its police power, to protect the safety, health, morals, and general welfare of its people. *Hieb v. Opp*, 458 N.W.2d 797 (S.D. 1990).
- 6 *Hartford Accident & Indemnity Co. v. N.O. Nelson Mfg. Co.*, 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420, 55 A.L.R.2d 467 (1955).
- 7 *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937); *Nebbia v. People of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); *Stephenson v. Binford*, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932).
- 8 *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).
- 9 *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 53 S. Ct. 133, 77 L. Ed. 306, 87 A.L.R. 285 (1932); *Stephenson v. Binford*, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932); *Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.*, 178 Md. 38, 12 A.2d 201 (1940).
- 10 *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 53 S. Ct. 133, 77 L. Ed. 306, 87 A.L.R. 285 (1932); *State v. Gateway Mortuaries*, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512 (1930); *Alford v. Textile Ins. Co.*, 248 N.C. 224, 103 S.E.2d 8, 70 A.L.R.2d 408 (1958).
- 11 *Louisville & N.R. Co. v. Scott*, 219 U.S. 209, 31 S. Ct. 171, 55 L. Ed. 183 (1911); *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U.S. 186, 31 S. Ct. 164, 55 L. Ed. 167 (1911).
- An airline's "no sale" rule, prohibiting the purchase of frequent flyer travel awards from customers and their resale to third parties, was enforceable as matter of law, and the Utah Constitution's property clause did not apply to the alienation of contract rights. *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992).
- 12 *Workmen's Compensation Board of Kentucky v. Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789 (1925).
- 13 *Louisville & N.R. Co. v. Scott*, 219 U.S. 209, 31 S. Ct. 171, 55 L. Ed. 183 (1911); *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U.S. 186, 31 S. Ct. 164, 55 L. Ed. 167 (1911).
- 14 *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); *East Central Oklahoma Elec. Co-op., Inc. v. Public Service Co.*, 1970 OK 80, 469 P.2d 662 (Okla. 1970).
- 15 *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).
- 16 *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934).
- 17 *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701 (1930).
- 18 *Patterson v. Eudora*, 190 U.S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 (1903); *Jones v. Hadfield*, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 (1936) (on rehearing).
- 19 *Hartford Accident & Indemnity Co. v. N.O. Nelson Mfg. Co.*, 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).
- 20 *The Cadle Co. v. City of Kentwood*, 285 Mich. App. 240, 776 N.W.2d 145 (2009).

## 16B Am. Jur. 2d Constitutional Law § 643

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### d. Rights of Contract

## § 643. Limitations on freedom of contract—Imposed by Congress

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1112(1)

Congress may regulate the making and performance of contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created.<sup>1</sup> Congress may also regulate the making and performance of contracts in the exercise of its wartime powers.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Highland v. Russell Car & Snowplow Co.](#), 279 U.S. 253, 49 S. Ct. 314, 73 L. Ed. 688 (1929).

<sup>2</sup> [Highland v. Russell Car & Snowplow Co.](#), 279 U.S. 253, 49 S. Ct. 314, 73 L. Ed. 688 (1929).

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## 16B Am. Jur. 2d Constitutional Law § 644

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### d. Rights of Contract

### § 644. Limitations on freedom of contract—Imposed by states; contracts involving extraterritorial elements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1109 to 1112(1)

#### A.L.R. Library

[State regulation of land ownership by alien corporation, 21 A.L.R.4th 1329](#)

State regulation generally is exercised by means of the police power for the promotion of the health, safety, morals, and welfare of the inhabitants of the states;<sup>1</sup> and there is no absolute right to contract free of state regulation under the police power.<sup>2</sup> However, the power of the states to regulate and limit liberty of contract is subject to the limitation that the limitations imposed must be reasonable.<sup>3</sup> State legislation that invades freedom of contract can be sustained only if it both relates to the claimed objective and employs means which are both reasonable and reasonably appropriate to secure such objective.<sup>4</sup>

**Observation:**

The legislature's general police power gives it broad authority to limit prospectively what parties may contract for, but it may retroactively impair existing contracts only through the necessary police power, which is much narrower.<sup>5</sup>

The Due Process Clause of the 14th Amendment has very greatly restricted the power of a state to impose conditions substantially affecting foreign rights sought to be enforced within its borders, if jurisdiction is assumed by the courts of a state of an action involving the enforcement of such rights.<sup>6</sup>

Because of the Due Process Clause, a state statute cannot modify the substantive rights involved in a contract, the operation of which is extraterritorial or substantially so as far as the state is concerned.<sup>7</sup> A state cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction and lawful where made.<sup>8</sup> A state statute may not validly affect rights and obligations arising from contracts which are not made or to be performed in the state, and may not, consistent with the Due Process Clause, penalize or tax a contract entered into and to be performed outside the state, even though one of the contracting parties is within the state.<sup>9</sup> A state may not prohibit one of its citizens from making contracts outside its limits and jurisdiction where they are to be performed outside the state.<sup>10</sup> It follows that a state statute, placing a limitation upon the power to enter into particular contracts, can reach only contracts made within the state.<sup>11</sup> Moreover, it may not prohibit one of its citizens from doing an act which is merely the performance of a condition rendered necessary by the provisions of such a contract affecting property which is located within its borders.<sup>12</sup> Furthermore, it may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.<sup>13</sup>

The place where the contract is made is of the utmost significance in determining the application of the foregoing rules, for where the contract is entered into within a state, its terms, obligations, and sanctions are subject, in some measure, to the legislative control of such state, notwithstanding that such a contract is to be performed elsewhere.<sup>14</sup>

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**Footnotes**

- 1 § 382.
- 2 *Med Exp. Ambulance Service, Inc. v. Evangeline Parish Police Jury*, 684 So. 2d 359 (La. 1996).
- 3 *Alaska Packers Ass'n v. Industrial Acc. Com'n*, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 4 *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.*, 988 N.E.2d 250 (Ind. 2013).
- 5 *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.*, 988 N.E.2d 250 (Ind. 2013).
- 6 *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701 (1930).  
A state may not apply to an employees' fidelity insurance contract entered into in another state its own statute annulling any contractual limitation of the time for giving notice of claim, although the default occurred after the removal of the insured and his defaulting employee to the state in which the action is brought.

- 7 Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934).
- 8 Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934).
- 9 Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934).
- 10 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); Home Ins. Co. v. Dick, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701 (1930).
- 11 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 12 U.S. Mortgage & Trust Co. v. Ruggles, 258 N.Y. 32, 179 N.E. 250, 79 A.L.R. 802 (1932).
- 13 St. Louis Cotton Compress Co. v. State of Arkansas, 260 U.S. 346, 43 S. Ct. 125, 67 L. Ed. 297 (1922).
- 14 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934); Home Ins. Co. v. Dick, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701 (1930).
- Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); Department of Financial Institutions v. General Finance Corp., 227 Ind. 373, 86 N.E.2d 444, 10 A.L.R.2d 436 (1949).

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## 16B Am. Jur. 2d Constitutional Law § 645

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### e. Other Property Rights

## § 645. Property rights in judgment or decree

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1109

Rights acquired by a judgment are property rights which cannot be taken without due process of law.<sup>1</sup> The right to enforce payment of a judgment is a property right which is beyond the power of a state to destroy.<sup>2</sup> However, where a judgment creditor has actually received on account of a judgment all that he or she is entitled to receive, the creditor cannot be said to have been deprived of property.<sup>3</sup> Also, a party cannot be said to be deprived of his or her property in a judgment because at the time he or she is unable to collect.<sup>4</sup>

Since an injunction decree does not create a right, its modification cannot be considered as an unconstitutional deprivation of property without due process of law.<sup>5</sup>

A statute preventing assignees of claims from filing or prosecuting a claim in the small claims division, as interpreted to prohibit the assignment of small claims judgments, does not interfere with the property rights of assignees of small claims court judgments where, at the time the assignees purchase the small claims judgments from the assignor, an appellate court has already interpreted the term "prosecution," as used in the statute as applying to all stages of the proceedings in the small claims division, and the assignees, who are presumed to know the law, have purchased the small claims judgments at their own peril.<sup>6</sup>

Footnotes

- 1 Collins v. Welsh, 75 F.2d 894, 99 A.L.R. 1319 (C.C.A. 9th Cir. 1935); Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Scott, 346 Pa. 13, 29 A.2d 328, 144 A.L.R. 849 (1942).
- 2 Weinstein v. McElligott, 256 A.D. 307, 10 N.Y.S.2d 320 (2d Dep't 1939), judgment rev'd on other grounds, 281 N.Y. 605, 22 N.E.2d 171 (1939).
- 3 Morley v. Lake Shore & M.S. Ry. Co., 146 U.S. 162, 13 S. Ct. 54, 36 L. Ed. 925 (1892).
- 4 State of Louisiana ex rel. Folsom v. City of New Orleans, 109 U.S. 285, 3 S. Ct. 211, 27 L. Ed. 936 (1883); City of Sherman v. Langham, 92 Tex. 13, 40 S.W. 140 (1897), rev'd on other grounds, 92 Tex. 13, 42 S.W. 961 (1897).
- 5 Jackson Grain Co. v. Lee, 150 Fla. 232, 7 So. 2d 143 (1942); Ladner v. Siegel, 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172 (1930).
- 6 The Cadle Co. v. City of Kentwood, 285 Mich. App. 240, 776 N.W.2d 145 (2009).

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## 16B Am. Jur. 2d Constitutional Law § 646

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### e. Other Property Rights

## § 646. Property rights in connection with imposition of liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1109

The rules governing the imposition of liability raise fundamental questions of taking of property rights. The state has the power to impose absolute liability upon one causing loss of property to another by the use of agencies necessarily destructive and in the use of which absolute control is impossible, whether the one using the agency is a private person or a corporation.<sup>1</sup> A corporation's interest in its trade secrets is not a constitutionally protected property interest for purposes of determining whether the corporation's interest in protecting documents produced in connection with a products liability action is sufficient to overcome the presumption of openness and allow the sealing of documents.<sup>2</sup> However, the constitutional right to acquire, possess, and protect property prevents making a person liable for the acts and engagements of strangers over whom he or she has no control.<sup>3</sup>

Punitive damages may be allowed without violating due process.<sup>4</sup> However, it is possible for an award of punitive damages to be grossly excessive under particular circumstances and as such violative of due process.<sup>5</sup>

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### Footnotes

<sup>1</sup> [Campbell v. Missouri Pac. Ry. Co.](#), 121 Mo. 340, 25 S.W. 936 (1894).

- 2                    [General Tire, Inc. v. Kepple](#), 917 S.W.2d 444 (Tex. App. Houston 14th Dist. 1996), writ granted, (Dec. 13, 1996) and rev'd on other grounds, 970 S.W.2d 520 (Tex. 1998).
- 3                    [Durkin v. Kingston Coal Co.](#), 171 Pa. 193, 33 A. 237 (1895).
- 4                    [Louis Pizitz Dry Goods Co. v. Yeldell](#), 274 U.S. 112, 47 S. Ct. 509, 71 L. Ed. 952, 51 A.L.R. 1376 (1927).  
The common-law method of assessing punitive damages does not violate the Due Process Clause and is not per se unconstitutional. [Pacific Mut. Life Ins. Co. v. Haslip](#), 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).
- 5                    [BMW of North America, Inc. v. Gore](#), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

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## 16B Am. Jur. 2d Constitutional Law § 647

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 3. Property

##### e. Other Property Rights

## § 647. Statutory property rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1109

Property rights acquired under a statute, duly adjudged to be constitutional, are valid legal rights that are protected by the constitution, not by judicial decision. However, rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is subsequently adjudged invalid, even though the statute was considered valid by eminent attorneys, public officers, and others.<sup>1</sup>

While legislative power generally includes the power to repeal existing laws as well as the power to enact new laws,<sup>2</sup> the repeal or amendment of a statute can be precluded by the Due Process Clause where vested rights have accrued under the statute.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [State v. Greer](#), 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298 (1924).
- <sup>2</sup> [Am. Jur. 2d, Statutes § 259](#).
- <sup>3</sup> [§ 740](#).

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## 16B Am. Jur. 2d Constitutional Law § 648

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 648. Right of privacy, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  727, 1210 to 1218, 1225 to 1275

### A.L.R. Library

[Mandatory Waiting Period for Abortions](#), 37 A.L.R.7th Art. 8

[Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising—Purported Endorsement of Product or Services](#), 17 A.L.R.7th Art. 2

[Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising—First Amendment Cases](#), 15 A.L.R.7th Art. 6

[Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising—Consent and Waiver](#), 13 A.L.R.7th Art. 4

### Trial Strategy

[Invasion of Privacy By Public Disclosure of Private Facts](#), 103 Am. Jur. Proof of Facts 3d 159

[Litigation Under Video Rental/Sale Privacy Protection Laws](#), 148 Am. Jur. Trials 305

## Invasion of Privacy By Public Disclosure of Private Facts, 123 Am. Jur. Trials 433

**Forms**Forms relating to right to privacy, see Am. Jur. Pleading and Practice Forms, Constitutional Law [\[Westlaw®\(r\) Search Query\]](#)

The right of privacy, as an independent and distinctive legal concept, and as one of the major fundamental constitutional rights<sup>1</sup> has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy,<sup>2</sup> and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion.<sup>3</sup> Privacy interests of two classes are recognized: interests in precluding dissemination or misuse of sensitive and confidential information ("informational privacy"),<sup>4</sup> and interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy").<sup>5</sup> The Constitution protects an individual interest in avoiding disclosure of personal matters; this interest covers a wide range of personal matters, including sexual activity,<sup>6</sup> medical information,<sup>7</sup> and financial matters.<sup>8</sup> Privacy interests which relate to disclosure of personal matters, i.e., informational privacy, encompass two areas: the first is the government's collection and storing of information about citizens; and the second area is the release of information to the public or another government agency, i.e., public dissemination of information.<sup>9</sup> Under the right to privacy, a particular class of information is "private" when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity.<sup>10</sup> However, there is no general constitutional right of nondisclosure of personal information.<sup>11</sup>

The protection of privacy afforded by some constitutions does not extend so far as to protect private citizens against actions of private individuals;<sup>12</sup> the federal and most of the state constitutional provisions which expressly protect an individual's privacy interests apply to state action only.<sup>13</sup> In addition, the impact on a claimant's privacy rights must be more than slight or trivial in order to support a constitutional claim for violation of his or her right to privacy.<sup>14</sup>

While the Federal Constitution does not explicitly mention any right of privacy,<sup>15</sup> the Supreme Court of the United States has declared that the right of privacy is a fundamental right guaranteed by the Federal Constitution.<sup>16</sup> The Federal Constitution promises that there is a realm of personal liberty which the government may not enter, and the result is a right of personal privacy or a guarantee of certain areas or zones of privacy.<sup>17</sup> The rights included within that zone are deemed fundamental and include activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. They involve the most intimate and personal choices a person can make in his or her lifetime and include choices central to the liberty protected by the 14th Amendment.<sup>18</sup> A person's general right of privacy has been described by the Supreme Court and other courts as "the right to be let alone."<sup>19</sup>

**Observation:**

Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers. Thus, in considering how to protect personal privacy interests, the State cannot engage in content-based discrimination to advance its own side of a debate.<sup>20</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Florida's right to privacy protected persons from governmental, not private, intrusion, and thus insurance appraiser's constitutional right to privacy was not infringed by court order allowing insured or someone on his behalf to audio and video record appraiser's inspection of insured's home; insured was legally entitled to be present during the inspection. [Fla. Const. art. 1, § 23. State Farm Florida Insurance Company v. Chirino, 300 So. 3d 1240 \(Fla. 3d DCA 2020\).](#)

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Zimmerman v. Pope, 2015 Ark. App. 499, 471 S.W.3d 646 \(2015\); Saunders v. Superior Court, 12 Cal. App. 5th Supp. 1, 219 Cal. Rptr. 3d 5 \(Cal. App. Dep't Super. Ct. 2017\); Weaver v. Myers, 229 So. 3d 1118 \(Fla. 2017\); Pacific Radiation Oncology, LLC v. Queen's Medical Center, 138 Haw. 14, 375 P.3d 1252 \(2016\); DiSabato v. Board of Trustees of State Employees' Retirement System of Illinois, 285 Ill. App. 3d 827, 221 Ill. Dec. 59, 674 N.E.2d 852 \(1st Dist. 1996\); Massman v. Massman, 505 S.W.3d 406 \(Mo. Ct. App. E.D. 2016\); Montana Shooting Sports Ass'n, Inc. v. State, 2010 MT 8, 355 Mont. 49, 224 P.3d 1240 \(2010\); Pennsylvania Social Services Union, Local 688 of Service Employees Intern. Union v. Com., 59 A.3d 1136 \(Pa. Commw. Ct. 2012\); In re Detention of D.A.H., 84 Wash. App. 102, 924 P.2d 49 \(Div. 1 1996\).](#)  
Personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in the constitutional guarantee of personal privacy. [Preterm-Cleveland v. Himes, 294 F. Supp. 3d 746 \(S.D. Ohio 2018\), aff'd, 940 F.3d 318 \(6th Cir. 2019\), reh'g en banc granted, opinion vacated, 944 F.3d 630 \(6th Cir. 2019\).](#)  
The right to privacy under the Florida Constitution is a fundamental right, but there must first be evidence of a legitimate expectation of privacy, considering all the circumstances. [Varricchio v. St. Lucie County Clerk of Courts, 271 So. 3d 1206 \(Fla. 1st DCA 2019\).](#)
- 2 [Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 \(1975\); Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 899 F. Supp. 1443, 104 Ed. Law Rep. 246 \(M.D. N.C. 1995\), aff'd, 89 F.3d 174, 110 Ed. Law Rep. 1037 \(4th Cir. 1996\).](#)  
As to tort actions for invasion of privacy, see [Am. Jur. 2d, Privacy §§ 200 to 215.](#)
- 3 [Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 \(1975\); Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 899 F. Supp. 1443, 104 Ed. Law Rep. 246 \(M.D. N.C. 1995\), aff'd, 89 F.3d 174, 110 Ed. Law Rep. 1037 \(4th Cir. 1996\); State v. Planned Parenthood of Alaska, 171 P.3d 577 \(Alaska 2007\).](#)
- 4 [Cantu v. Rocha, 77 F.3d 795, 107 Ed. Law Rep. 459 \(5th Cir. 1996\); Wurzelbacher v. Jones-Kelley, 675 F.3d 580 \(6th Cir. 2012\); California Advocates for Nursing Home Reform v. Smith, 38 Cal. App. 5th 838, 251 Cal. Rptr. 3d 636 \(1st Dist. 2019\), as modified on denial of reh'g, \(Aug. 21, 2019\); Brende v. Hara, 113 Haw.](#)

- 424, 153 P.3d 1109 (2007); *Montana Shooting Sports Ass'n, Inc. v. State*, 2010 MT 8, 355 Mont. 49, 224 P.3d 1240 (2010); *Pennsylvania State Education Association v. Commonwealth, Department of Community and Economic Development*, 637 Pa. 337, 148 A.3d 142, 337 Ed. Law Rep. 284 (2016).
- 5 *Cantu v. Rocha*, 77 F.3d 795, 107 Ed. Law Rep. 459 (5th Cir. 1996); *California Advocates for Nursing Home Reform v. Smith*, 38 Cal. App. 5th 838, 251 Cal. Rptr. 3d 636 (1st Dist. 2019), as modified on denial of reh'g, (Aug. 21, 2019); *Brende v. Hara*, 113 Haw. 424, 153 P.3d 1109 (2007).
- 6 *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150 (Colo. 2008) (holding modified by, *In re District Court, City and County of Denver*, 09CV7235., 256 P.3d 687 (Colo. 2011)).

A minor consulting with a health care professional in an effort to seek treatment for a reproductive health condition related to sexual activity has a legitimate expectation of privacy as to that information for purposes of federal constitutional right of privacy. *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853 (Ind. Ct. App. 2006).
- 7 *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150 (Colo. 2008) (holding modified by, *In re District Court, City and County of Denver*, 09CV7235., 256 P.3d 687 (Colo. 2011)); *Mullis v. State*, 79 So. 3d 747 (Fla. 2d DCA 2011); *Gerguis v. Statesboro HMA Medical Group, LLC*, 331 Ga. App. 867, 772 S.E.2d 227 (2015).
- 8 *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150 (Colo. 2008) (holding modified by, *In re District Court, City and County of Denver*, 09CV7235., 256 P.3d 687 (Colo. 2011)).
- 9 *In re Rausch*, 197 B.R. 109 (Bankr. D. Nev. 1996), decision aff'd, 213 B.R. 364 (D. Nev. 1997), aff'd, 194 F.3d 954 (9th Cir. 1999) and aff'd, 194 F.3d 954 (9th Cir. 1999).

Assuming, without deciding, that the Constitution protects a right to informational privacy, such right was not violated by Standard Form 85 (SF-85), that part of a form questionnaire asking about treatment or counseling for recent illegal-drug use, which "non-sensitive" employees of the Jet Propulsion Laboratory were required to complete pursuant to a government policy requiring that contract employees with long-term access to federal facilities submit to a standard background check; the question was a reasonable, employment-related inquiry, the responses were properly used as a mitigating factor in contractor credentialing decisions, and the government's interests as employer and proprietor in managing its internal operations, especially in ensuring the security of facilities and in employing a competent, reliable, law-abiding workforce, combined with the Privacy Act's protections against public dissemination, satisfied any interest in avoiding disclosure that may arguably have had its roots in the Constitution. *National Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 131 S. Ct. 746, 178 L. Ed. 2d 667 (2011).
- 10 *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 64 Cal. Rptr. 3d 693, 165 P.3d 488 (2007).
- 11 *Jenkins v. Rock Hill Local School Dist.*, 513 F.3d 580, 229 Ed. Law Rep. 40 (6th Cir. 2008).
- 12 *Gilbert v. Sears, Roebuck and Co.*, 899 F. Supp. 597 (M.D. Fla. 1995) (interpreting Florida Constitution); *Stern v. Great Western Bank*, 959 F. Supp. 478 (N.D. Ill. 1997) (interpreting Illinois Constitution); *Born v. Blockbuster Videos, Inc.*, 941 F. Supp. 868 (S.D. Iowa 1996); *Chizmar v. Mackie*, 896 P.2d 196, 69 A.L.R.5th 719 (Alaska 1995); *Brennan v. Board of Trustees for University of Louisiana Systems*, 691 So. 2d 324, 117 Ed. Law Rep. 803 (La. Ct. App. 1st Cir. 1997).
- 13 *Born v. Blockbuster Videos, Inc.*, 941 F. Supp. 868 (S.D. Iowa 1996); *Guilbeaux v. Guilbeaux*, 981 So. 2d 913 (La. Ct. App. 3d Cir. 2008); *State v. Malkuch*, 2007 MT 60, 336 Mont. 219, 154 P.3d 558 (2007).

However, the right to privacy in Puerto Rico exists *ex proprio vigore*, and is enforceable between private individuals. *Rivera-Cartagena v. Wal-Mart Puerto Rico, Inc.*, 767 F. Supp. 2d 310 (D.P.R. 2011).
- 14 *Hansen v. California Dept. of Corrections*, 920 F. Supp. 1480 (N.D. Cal. 1996).
- 15 *Carey v. Population Services, Intern.*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).
- 16 *Keweenaw Oil Co. v. Bicon Corp.*, 416 U.S. 470, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); *Kaplan v. California*, 413 U.S. 115, 93 S. Ct. 2680, 37 L. Ed. 2d 492 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).
- 17 *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997); *Cowles Pub. Co. v. Kootenai County Bd. of County Com'rs*, 144 Idaho 259, 159 P.3d 896 (2007); *State v. Champoux*, 5 Neb. App. 68, 555 N.W.2d 69 (1996), aff'd, 252 Neb. 769, 566 N.W.2d 763 (1997); *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996).

- 18 [Alexander v. Whitman](#), 114 F.3d 1392 (3d Cir. 1997); [State Journal-Register v. University of Illinois Springfield](#), 373 Ill. Dec. 936, 994 N.E.2d 705, 297 Ed. Law Rep. 468 (App. Ct. 4th Dist. 2013); [State v. Champoux](#), 5 Neb. App. 68, 555 N.W.2d 69 (1996), *aff'd*, 252 Neb. 769, 566 N.W.2d 763 (1997); [City of Sherman v. Henry](#), 928 S.W.2d 464 (Tex. 1996).
- Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form but one element in a personal bond that is more enduring. [U.S. v. Windsor](#), 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
- A nocturnal juvenile curfew ordinance making it a misdemeanor for persons under the age of 17 to use city streets or to be present at other public places within the city between certain hours did not violate their parents' fundamental right of privacy by dictating the manner in which the children would be raised. Because of broad exemptions included in the curfew ordinance, the parents retained their right to make decisions regarding their children. [Qutb v. Strauss](#), 11 F.3d 488 (5th Cir. 1993).
- The right to privacy encompasses an individual interest in avoiding disclosure of personal matters, and an interest in independence in making certain kinds of important decisions. However, the constitutional protection against public dissemination of information is limited and extends only to highly personal matters representing "the most intimate aspects of human affairs." [Eagle v. Morgan](#), 88 F.3d 620 (8th Cir. 1996).
- 19 [U. S. v. Thirty-Seven \(37\) Photographs](#), 402 U.S. 363, 91 S. Ct. 1416, 28 L. Ed. 2d 822 (1971); [Rowan v. U.S. Post Office Dept.](#), 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970); [Katz v. U.S.](#), 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); [State v. Campbell](#), 306 Or. 157, 759 P.2d 1040 (1988); [City of Sherman v. Henry](#), 928 S.W.2d 464 (Tex. 1996).
- Personal privacy even in one's own home receives ample protection from the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors. [Sorrell v. IMS Health Inc.](#), 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).
- 20 [Sorrell v. IMS Health Inc.](#), 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

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## 16B Am. Jur. 2d Constitutional Law § 649

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 649. Sources of right of privacy; relation to other rights specified in Constitution

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) , 727, 1210 to 1218

The right of privacy is rooted in, and exists in the "penumbra"<sup>1</sup> of various specific constitutional provisions which have been deemed to create "zones of privacy,"<sup>2</sup> such as the First Amendment's guarantee of free speech and press<sup>3</sup> and of freedom of association,<sup>4</sup> the Third Amendment's prohibition of peacetime quartering of soldiers in any house without the owner's consent,<sup>5</sup> the Fourth Amendment's prohibition of unreasonable searches and seizures,<sup>6</sup> the Fifth Amendment's privilege against self-incrimination,<sup>7</sup> and the Ninth Amendment's reservation to the people of rights not enumerated in the Constitution.<sup>8</sup> Courts have also stated that the right of personal privacy is one aspect of the "liberty" protected by the Due Process Clause of the 14th Amendment<sup>9</sup> and that the right is also in part derived from natural law.<sup>10</sup> Where the right of privacy conflicts with other constitutional rights, each case ultimately must depend on its own specific facts.<sup>11</sup>

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### Footnotes

- <sup>1</sup> [Griswold v. Connecticut](#), 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).  
As to the "penumbra" doctrine, generally, see § 413.
- <sup>2</sup> [Paul v. Davis](#), 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); [Roe v. Wade](#), 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)); [Griswold v. Connecticut](#),

- 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *State Journal-Register v. University of Illinois Springfield*, 373 Ill. Dec. 936, 994 N.E.2d 705, 297 Ed. Law Rep. 468 (App. Ct. 4th Dist. 2013).
- 3 *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *In re Detention of D.A.H.*, 84 Wash. App. 102, 924 P.2d 49 (Div. 1 1996).
- The First Amendment does encompass a right of privacy, whose contours include within it a right to make personal decisions and a right to keep personal matters private. *Dible v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008).
- As to freedom of speech and press, generally, see §§ 458 to 553.
- As to conflict with right of privacy, generally, see § 463.
- 4 *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *DeGregory v. Attorney General of State of N. H.*, 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960).
- As to associational privacy, generally, see § 589.
- 5 *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
- 6 *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977); *Schneekloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Berger v. State of N.Y.*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).
- As to the Fourth Amendment, including its history and purpose, see *Am. Jur. 2d, Searches and Seizures* §§ 1 to 17.
- 7 *Bellis v. U. S.*, 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1974); *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966); *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966); *In re Detention of D.A.H.*, 84 Wash. App. 102, 924 P.2d 49 (Div. 1 1996).
- 8 *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
- 9 *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); *Carey v. Population Services, Intern.*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)); *Vanderlinden v. State of Kan.*, 874 F. Supp. 1210 (D. Kan. 1995), judgment aff'd, 103 F.3d 940 (10th Cir. 1996).
- As to the concept of "liberty," generally, see §§ 607 to 627.
- 10 *In re Tarrant*, 190 B.R. 704 (Bankr. S.D. Ga. 1995).
- 11 *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

## 16B Am. Jur. 2d Constitutional Law § 650

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 650. Scope and limitations of right of privacy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) , 1225 to 1275

### A.L.R. Library

[Expunction of federal arrest records in absence of conviction, 97 A.L.R. Fed. 652](#)

The Supreme Court and other courts have held or recognized that the Federal Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, contraception, abortion, motherhood, family relationships, child rearing, and education.<sup>1</sup> Among other areas of privacy are political privacy<sup>2</sup> and privacy of communications<sup>3</sup> or records,<sup>4</sup> personal financial matters,<sup>5</sup> and first-class mail.<sup>6</sup> However, a constitutional right to privacy is not violated when a governmental employee's salary is disclosed to a newspaper, as such information contributes to the public's understanding and oversight of governmental operations by allowing interested parties to monitor the expenditure of public funds.<sup>7</sup>



**Caution:**

No federal constitutional right to privacy in one's criminal or police record exists; arrest and conviction information are matters of public record.<sup>8</sup> A lifetime registration requirement did not violate the constitutional right to privacy of an individual classified as a sexually violent offender based on a rape conviction, even assuming that registration might implicate social ostracism, loss of employment opportunities, and possible verbal and physical harassment; the offender's criminal record was part of the public domain, and his picture and address which were also contained in the registry were not intimate details of the kind ordinarily considered "private" under the law.<sup>9</sup> The smoking of tobacco is not a fundamental right, and because there is not a fundamental right to smoke, there is no constitutional privacy interest in smoking in a private facility.<sup>10</sup>

The right to make decisions regarding one's own bodily integrity<sup>11</sup> and medical treatment is embraced in both federal<sup>12</sup> and state<sup>13</sup> constitutional rights of privacy. However, only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the federal guarantee of the right of personal privacy,<sup>14</sup> and not every government disclosure of personal information invokes constitutional protection.<sup>15</sup> Driver's licensees' constitutional right to privacy has been held not violated when officials release the licensees' personal information to mass marketers without their consent.<sup>16</sup> One's telephone number has been treated as not among the select privacy interests protected by the federal constitutional right to privacy;<sup>17</sup> however, there is authority to the contrary.<sup>18</sup> It has been held that a Social Security number is not within one of the zones of privacy recognized by the United States Supreme Court as fundamental or implicit in the concept of ordered liberty, as the Social Security number has nothing to do with a person's most basic decisions about family, parenthood, or bodily integrity.<sup>19</sup> However, there is authority to the contrary as to this as well,<sup>20</sup> and it has been held that with respect to statutory disclosure requirements, the fact that a Social Security number may be available at a clerk's office does not eliminate a person's expectation of privacy altogether.<sup>21</sup>

A state's publication of an arrest does not violate the arrestee's right to privacy as guaranteed by the Federal Constitution,<sup>22</sup> and because a criminal defendant has no reasonable expectation of privacy in recorded telephone calls made from jail, the transmission of such recordings to the police does not violate the defendant's right of privacy.<sup>23</sup> The government has the requisite interest in tax administration to pass constitutional muster, and the federal income tax information confidentiality and disclosure statute is sufficiently related to that interest, without unnecessarily infringing on any privacy rights that a taxpayer might have in his or her tax information.<sup>24</sup>

The right of privacy is not concerned with a particular place but with a protected intimate relationship.<sup>25</sup> Ordinarily, not protected by considerations of privacy are persons in public places—such as on public streets,<sup>26</sup> in a courthouse corridor,<sup>27</sup> on public conveyances,<sup>28</sup> in public meetings,<sup>29</sup> or in theaters.<sup>30</sup> A witness before a grand jury ordinarily has no constitutional right of privacy.<sup>31</sup> Likewise, consistent with the protections afforded by the Federal Constitution, the state may burden the privacy rights of a minor based on a less rigorous standard than the compelling interest test that applies to adults—the state must show only that the restriction on the minor's rights serves a significant state interest.<sup>32</sup>

**Observation:**

A professional football team's implementation of a pat down inspection policy for all ticket holders prior to entering a stadium to attend games implicated the state constitutional interest in "autonomy privacy," or making intimate personal decisions or conducting personal activities without observation, intrusion, or interference, and thus ticket holders challenging the policy adequately alleged a legally protected privacy interest for purposes of demurrer, since the plaintiffs generally had a right not to have others pat them down.<sup>33</sup>

Obscene material unprotected by the First Amendment does not in itself carry a penumbra of constitutionally protected privacy; with regard to the First Amendment right of an individual to possess obscene material in the privacy of his or her home, such privacy of the home is not to be equated with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he or she goes.<sup>34</sup> Moreover, the possession of Internet child pornography does not involve any vital privacy interest.<sup>35</sup>

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**Footnotes**

- 1 [Washington v. Glucksberg](#), 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); [Carey v. Population Services, Intern.](#), 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977); [U.S. v. Orito](#), 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973); [Paris Adult Theatre I v. Slaton](#), 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); [Alexander v. Whitman](#), 114 F.3d 1392 (3d Cir. 1997); [Wilson v. Collins](#), 517 F.3d 421 (6th Cir. 2008); [Roach v. City of Evansville](#), 111 F.3d 544 (7th Cir. 1997); [Cockrum v. Johnson](#), 917 F. Supp. 479 (E.D. Tex. 1996); [In re Rausch](#), 197 B.R. 109 (Bankr. D. Nev. 1996), decision [aff'd](#), 213 B.R. 364 (D. Nev. 1997), [aff'd](#), 194 F.3d 954 (9th Cir. 1999) and [aff'd](#), 194 F.3d 954 (9th Cir. 1999); [Doe v. Doe](#), 116 Haw. 323, 172 P.3d 1067 (2007).  
In some situations, United States Constitution confers a right of privacy; although the government is precluded from regulating a childbearing decision, it is not similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education. [Runyon v. McCrary](#), 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976).  
A state statute which prohibited doctors from performing abortions on minors without parental consent or judicial authorization placed a burden on minors' fundamental right to privacy and, thus, was subject to strict scrutiny. [State v. Planned Parenthood of Alaska](#), 171 P.3d 577 (Alaska 2007).  
Parental authority over decisions involving their minor children derives from the liberty interest contained in the 14th Amendment in the United States Constitution and the guarantee of privacy in the state constitution. [Kirtan v. Fields](#), 997 So. 2d 349 (Fla. 2008).
- 2 [DeGregory v. Attorney General of State of N. H.](#), 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966).
- 3 [Gelbard v. U. S.](#), 408 U.S. 41, 92 S. Ct. 2357, 33 L. Ed. 2d 179 (1972).
- 4 [Patrick v. City of Overland Park, Kan.](#), 937 F. Supp. 1491 (D. Kan. 1996); [T.L.S. v. Montana Advocacy Program](#), 2006 MT 262, 334 Mont. 146, 144 P.3d 818 (2006) (psychiatric health records); [McNiel v. Cooper](#), 241 S.W.3d 886 (Tenn. Ct. App. 2007) (medical records); [Industrial Foundation of the South v. Texas Indus. Acc. Bd.](#), 540 S.W.2d 668 (Tex. 1976).

- 5 In re McVane, 44 F.3d 1127 (2d Cir. 1995); Hunter v. S.E.C., 879 F. Supp. 494 (E.D. Pa. 1995); Hett v. Barron-Lunde, 2020 WL 355526 (Fla. 2d DCA 2020); People v. Nesbitt, 405 Ill. App. 3d 823, 345 Ill. Dec. 161, 938 N.E.2d 600 (2d Dist. 2010).  
Tax information gathered by the government is not public information but is subject to the right of privacy. Financial privacy rights invoke intermediate or heightened scrutiny of laws infringing those rights because of serious regard given financial privacy by individuals, courts, and legislators. Taylor v. U.S. I.R.S., 915 F. Supp. 1015 (N.D. Iowa 1996), judgment aff'd, 106 F.3d 833 (8th Cir. 1997).
- 6 U.S. v. Van Leeuwen, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970).
- 7 International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 64 Cal. Rptr. 3d 693, 165 P.3d 488 (2007).
- 8 Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3d Cir. 1991); Cline v. Rogers, 87 F.3d 176, 1996 FED App. 0182P (6th Cir. 1996); Nilson v. Layton City, 45 F.3d 369, 97 Ed. Law Rep. 139 (10th Cir. 1995); Lee TT. v. Dowling, 87 N.Y.2d 699, 642 N.Y.S.2d 181, 664 N.E.2d 1243 (1996).
- 9 Doe v. Department of Public Safety and Correctional Services, 185 Md. App. 625, 971 A.2d 975 (2009).
- 10 American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).
- 11 Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); Crosby v. Hare, 932 F. Supp. 490 (W.D. N.Y. 1996).  
The right of a male prisoner to be free of strip searches and degrading body inspections conducted by female guards is basic to the concept of privacy, and thus the state's right to interfere with a person's bodily integrity by means of strip searches is subject to some constitutional limits. Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994).
- 12 Matter of Roche, 296 N.J. Super. 583, 687 A.2d 349 (Ch. Div. 1996).
- 13 Huffman v. State, 204 P.3d 339, 243 Ed. Law Rep. 461 (Alaska 2009); Stewart-Graves v. Vaughn, 162 Wash. 2d 115, 170 P.3d 1151 (2007).
- 14 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); In re Turner, 193 B.R. 548 (Bankr. N.D. Cal. 1996); In re Rausch, 197 B.R. 109 (Bankr. D. Nev. 1996), decision aff'd, 213 B.R. 364 (D. Nev. 1997), aff'd, 194 F.3d 954 (9th Cir. 1999) and aff'd, 194 F.3d 954 (9th Cir. 1999).
- 15 In re Rausch, 197 B.R. 109 (Bankr. D. Nev. 1996), decision aff'd, 213 B.R. 364 (D. Nev. 1997), aff'd, 194 F.3d 954 (9th Cir. 1999) and aff'd, 194 F.3d 954 (9th Cir. 1999).
- 16 Collier v. Dickinson, 477 F.3d 1306 (11th Cir. 2007).
- 17 People of State of Cal. v. F.C.C., 75 F.3d 1350 (9th Cir. 1996).  
Disclosure of telephone numbers and cell site information, as well as the date, time, and duration of calls related to a former employee's cellular telephone account did not represent a significant intrusion on the employee's privacy, and thus such information was subject to disclosure in the employee's suit challenging the enforceability of restrictive covenant and involving the employer's counterclaim to recover for misappropriation of trade secrets and conspiracy with a future employer. Mintz v. Mark Bartelstein & Associates, Inc., 885 F. Supp. 2d 987 (C.D. Cal. 2012).  
A telephone company's \$1.25 monthly fee for suppressing wireline service subscribers' telephone numbers from publication in the company's directories did not violate the state constitutional right to privacy of subscribers who paid the fee, since the subscribers did not expect privacy in the circumstances, where the subscribers knew their listing would be public unless they paid a fee to opt out of being listed. Willard v. AT&T Communications of California, Inc., 204 Cal. App. 4th 53, 138 Cal. Rptr. 3d 636 (2d Dist. 2012).
- 18 Favalora v. Sidaway, 996 So. 2d 895 (Fla. 4th DCA 2008) (names, addresses, and telephone numbers are forms of identity information that can be considered private and confidential); West Chester University of Pennsylvania v. Rodriguez, 216 A.3d 503, 370 Ed. Law Rep. 920 (Pa. Commw. Ct. 2019).
- 19 McCauley v. Computer Aid, Inc., 242 Fed. Appx. 810 (3d Cir. 2007); In re Turner, 193 B.R. 548 (Bankr. N.D. Cal. 1996); In re Rausch, 197 B.R. 109 (Bankr. D. Nev. 1996), decision aff'd, 213 B.R. 364 (D. Nev. 1997), aff'd, 194 F.3d 954 (9th Cir. 1999) and aff'd, 194 F.3d 954 (9th Cir. 1999).  
Both the California Constitution and the common law set a high bar for an invasion of privacy claim; even disclosure of personal information, including social security numbers, does not constitute an egregious breach of social norms to establish invasion of privacy. White v. Social Security Administration, 111 F. Supp. 3d 1041 (N.D. Cal. 2015).

Requiring disclosure of a social security number does not so threaten the sanctity of individual privacy as to require constitutional protection. [Houck v. Ferrari](#), 57 F. Supp. 3d 377 (D.N.J. 2014).

20 [West Chester University of Pennsylvania v. Rodriguez](#), 216 A.3d 503, 370 Ed. Law Rep. 920 (Pa. Commw. Ct. 2019).

21 [Burnett v. County of Bergen](#), 198 N.J. 408, 968 A.2d 1151 (2009).

22 [Hogan v. Hearst Corp.](#), 945 S.W.2d 246 (Tex. App. San Antonio 1997).

23 [Com. v. Boyarsky](#), 452 Mass. 700, 897 N.E.2d 574 (2008).

24 [Taylor v. U.S.](#), 106 F.3d 833 (8th Cir. 1997).

25 [Paris Adult Theatre I v. Slaton](#), 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) (the right of privacy does not prevent regulation of the exhibition of obscene movies in places of public accommodation; whereas the protection of privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved, there is no necessary or legitimate expectation of privacy extending to marital intercourse on a street corner or a theater stage).

26 [Erznoznik v. City of Jacksonville](#), 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); [State v. Ditton](#), 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (2006).

27 [Cohen v. California](#), 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

28 [Public Utilities Commission of District of Columbia v. Pollak](#), 343 U.S. 451, 72 S. Ct. 813, 96 L. Ed. 1068 (1952).

29 [Tarus v. Borough of Pine Hill](#), 189 N.J. 497, 916 A.2d 1036 (2007).

30 [U.S. v. Orito](#), 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973); [Paris Adult Theatre I v. Slaton](#), 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

31 [U.S. v. Calandra](#), 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).

32 [In re TC](#), 121 Haw. 92, 214 P.3d 1082 (Ct. App. 2009), as corrected, (June 25, 2009) and as corrected, (June 26, 2009).

33 [Sheehan v. San Francisco 49ers, Ltd.](#), 45 Cal. 4th 992, 89 Cal. Rptr. 3d 594, 201 P.3d 472 (2009).

34 [Paris Adult Theatre I v. Slaton](#), 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); [Davis v. State](#), 1996 OK CR 15, 916 P.2d 251 (Okla. Crim. App. 1996).

The constitutional right to possess obscene material in the privacy of one's home does not create a right to acquire it or import it from another country; nor can such a right to acquire or import obscene material be based on any other sphere of constitutionally protected privacy, such as that which encompasses the intimate medical problems of family, marriage, and motherhood. [U.S. v. 12 200-Foot Reels of Super 8mm. Film](#), 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973).

An obscene book, though unillustrated and sold to consenting adults only, is not protected by the First Amendment or by the constitutional right of privacy. [Kaplan v. California](#), 413 U.S. 115, 93 S. Ct. 2680, 37 L. Ed. 2d 492 (1973).

An obscenity statute was not unconstitutional as applied to a defendant who showed an obscene video to undercover police officers in his home and subsequently e-mailed the video to the officer; while the defendant's viewing of the material in the privacy of his own home was protected conduct, his exhibition of the material to the undercover police officers in the context of a business transaction involving the employment of the defendant to set up a pornographic Web site was not, and the defendant did not have a right to give obscene material to others. [Varkonyi v. State](#), 276 S.W.3d 27 (Tex. App. El Paso 2008), petition for discretionary review refused, (Oct. 29, 2008).

35 [Mathews v. Becerra](#), 8 Cal. 5th 756, 257 Cal. Rptr. 3d 2, 455 P.3d 277 (Cal. 2019).

Defendant's claim that the existence of a former version of a child pornography law which criminalized the recording of a consensual, legal sexual encounter violated the Privacy Clause of the Illinois Constitution was not cognizable, even though the illegal recording of the sexual act in question took place in private, rather than in public; the mere fact that the recording took place in private did not implicate the Privacy Clause, and the sexual act itself was not at issue, rather the recording of that act was. [People v. Hollins](#), 2012 IL 112754, 361 Ill. Dec. 402, 971 N.E.2d 504 (Ill. 2012).

## 16B Am. Jur. 2d Constitutional Law § 651

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 651. Scope and limitations of right of privacy—Absolute or conditional nature of right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  [727](#), [1210](#), [1214](#), [1217](#), [1228](#)

A number of state<sup>1</sup> and federal<sup>2</sup> courts have held that the right to privacy is not absolute, and it has been stated that as a general proposition, some state regulation in areas protected by the right of privacy is appropriate,<sup>3</sup> but that where "fundamental rights," such as the right of privacy, are involved, any state regulation limiting these rights may be justified only by a "compelling state interest,"<sup>4</sup> and legislative enactments regulating such rights must be narrowly drawn so as to express only the legitimate state interests at stake.<sup>5</sup>

### Observation:

Some states differentiate between a privacy interest in autonomy, which is deemed a fundamental right, and thus accorded the utmost protection, the infringement of which requires strict scrutiny and proof of a compelling government interest for such action to be justified,<sup>6</sup> and the right to confidentiality, which is deemed not a fundamental right and therefore subject to rational basis analysis.<sup>7</sup>

A court begins its analysis in a case alleging that legislation violates a state constitutional right to privacy by measuring the weight and depth of the individual right at stake so as to determine the proper level of scrutiny with which to review the challenged legislation.<sup>8</sup> In determining whether the government may seek or use private information, courts balance the government's interest in having or using the information against the individual's interest in denying access. Factors which must be considered in reaching a fair balance of competing interests include the type of information requested, the potential for harm in any subsequent nonconsensual disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the degree of the need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.<sup>9</sup> The judicial system must ensure that governmental infringements of the right to privacy are supported by sufficient justification.<sup>10</sup>

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## Footnotes

- 1 [State v. Planned Parenthood of Alaska](#), 171 P.3d 577 (Alaska 2007); [Jacob B. v. County of Shasta](#), 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003 (2007); [State v. Salle-Green](#), 93 So. 3d 1169 (Fla. 2d DCA 2012); [State, Dept. of Social Services v. McCorkle](#), 694 So. 2d 1077 (La. Ct. App. 5th Cir. 1997), writ denied, 700 So. 2d 517 (La. 1997); [State v. Goetz](#), 2008 MT 296, 345 Mont. 421, 191 P.3d 489 (2008); [Stewart-Graves v. Vaughn](#), 162 Wash. 2d 115, 170 P.3d 1151 (2007).  
Under the Fourth Amendment and the state constitution, the strong privacy interest in controlling the use of one's own DNA is not absolute, and can be abridged for a compelling opposing interest where laws are in place to limit use of the DNA to a specific purpose intended to satisfy that interest. [County of San Diego v. Mason](#), 209 Cal. App. 4th 376, 147 Cal. Rptr. 3d 135 (4th Dist. 2012).
- 2 [Roe v. Wade](#), 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)); [Rogers v. Giurbino](#), 288 F.R.D. 469 (S.D. Cal. 2012).  
A patient's federal constitutional privacy interest in medical records is not absolute. [Behar v. Pennsylvania Dept. of Transp.](#), 791 F. Supp. 2d 383 (M.D. Pa. 2011).  
Employee safety, public safety, and public confidence in safe air travel are sufficient countervailing interests to justify a potential invasion of privacy resulting from a "reasonable suspicion" drug test of airline employees. [Landon v. Northwest Airlines, Inc.](#), 72 F.3d 620 (8th Cir. 1995) (abrogated on other grounds by, [Torgerson v. City of Rochester](#), 643 F.3d 1031 (8th Cir. 2011)).
- 3 [Paris Adult Theatre I v. Slaton](#), 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).
- 4 [Anderson v. Blake](#), 469 F.3d 910 (10th Cir. 2006); [State v. Planned Parenthood of Alaska](#), 171 P.3d 577 (Alaska 2007); [A.H. v. State](#), 949 So. 2d 234 (Fla. 1st DCA 2007); [State, Dept. of Social Services v. McCorkle](#), 694 So. 2d 1077 (La. Ct. App. 5th Cir. 1997), writ denied, 700 So. 2d 517 (La. 1997); [State v. Goetz](#), 2008 MT 296, 345 Mont. 421, 191 P.3d 489 (2008); [Butler v. Kato](#), 137 Wash. App. 515, 154 P.3d 259 (Div. 1 2007).  
Only obvious invasions of interests fundamental to personal autonomy must be supported by a compelling interest. [Williams v. Superior Court](#), 3 Cal. 5th 531, 220 Cal. Rptr. 3d 472, 398 P.3d 69 (Cal. 2017).
- 5 [Roe v. Wade](#), 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)); [Anderson v. Blake](#), 469 F.3d 910 (10th Cir. 2006); [Loder v. Municipal Court](#), 17 Cal. 3d 859, 132 Cal. Rptr. 464, 553 P.2d 624 (1976).  
A person's constitutional right to privacy and right to bodily integrity is not absolute but may be overcome by countervailing state interests, including (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) maintaining the ethical integrity of the medical profession. [Stewart-Graves v. Vaughn](#), 162 Wash. 2d 115, 170 P.3d 1151 (2007).  
As to the validity of particular laws and regulations as affected by the constitutional right of privacy, see § 653.

6 [Butler v. Kato](#), 137 Wash. App. 515, 154 P.3d 259 (Div. 1 2007).  
7 [Butler v. Kato](#), 137 Wash. App. 515, 154 P.3d 259 (Div. 1 2007).  
8 [State v. Planned Parenthood of Alaska](#), 171 P.3d 577 (Alaska 2007).  
9 [In re Rausch](#), 197 B.R. 109 (Bankr. D. Nev. 1996), decision [aff'd](#), 213 B.R. 364 (D. Nev. 1997), [aff'd](#), 194 F.3d 954 (9th Cir. 1999) and [aff'd](#), 194 F.3d 954 (9th Cir. 1999).  
An attorney's constitutional privacy rights did not outweigh concerns for public confidence in the legal profession and thus did not serve to excuse the attorney's noncompliance with substance abuse treatment directives of Lawyers' Assistance Committee and Bar Association, which directives, as conditions for the practice of law, were set forth upon recommendations of the treatment facility to which the attorney had been referred following his conviction for driving under the influence of alcohol. [In re Merrill](#), 305 P.3d 288 (Alaska 2013).  
10 [Noffke v. Perez](#), 178 P.3d 1141 (Alaska 2008).

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## 16B Am. Jur. 2d Constitutional Law § 652

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 652. Privacy rights based on state constitutional provisions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  [727](#), [1210](#), [1211](#), [1215](#), [1225](#), [1226](#), [1228](#) to [1272](#)

A state court is free to give broader privacy protection under its state constitution than that given by the Federal Constitution.<sup>1</sup> Some state constitutions go beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy.<sup>2</sup> Privacy interests are a matter of particular state interest and local concern, for purposes of determining whether a state constitutional provision provides broader protection for privacy than a parallel federal constitutional provision.<sup>3</sup> Because a state constitution's right to privacy is explicit, its protections are necessarily more robust and broader in scope than those of the implied federal right to privacy.<sup>4</sup> Some state courts, in construing their state constitutions, have held that the United States Constitution is less protective of privacy than the state constitution.<sup>5</sup>

Determining whether a particular privacy interest has been unduly invaded, so as to violate a state constitutional provision that no person should be disturbed in that person's private affairs, or the person's home invaded, without authority of law, requires consideration of whether the privacy expectation is objectively reasonable, and also whether it is one that has been traditionally held.<sup>6</sup> Whether an individual has a legitimate expectation of privacy is determined by considering all the circumstances, especially objective manifestations of that expectation.<sup>7</sup> A court begins its analysis in a case alleging that legislation violates a state constitutional right to privacy by measuring the weight and depth of the individual right at stake so as to determine the proper level of scrutiny with which to review the challenged legislation.<sup>8</sup> In any state constitutional privacy case that raises a genuine, nontrivial invasion of a protected privacy interest, the justification for the conduct in question must be weighed and balanced against the intrusion on privacy resulting from the conduct.<sup>9</sup>



**Practice Tip:**

A plaintiff alleging invasion of privacy in violation of a state constitutional right to privacy must establish a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by the defendant constituting a serious invasion of privacy.<sup>10</sup> The defendant may prevail in a state constitutional privacy case by negating any of the three required elements or by pleading and proving, as an affirmative defense, that an invasion of privacy is justified because it substantially furthers one or more countervailing interests.<sup>11</sup> The plaintiff may rebut a defendant's assertion of a countervailing interest by showing that there are feasible and effective alternatives to the defendant's conduct which have a lesser impact on the privacy interest; of course, the defendant may also plead and prove other available defenses, such as consent or unclean hands, that may be appropriate in view of the nature of the claim and the relief requested.<sup>12</sup> Various factors such as advance notice, customs, practices, justification, physical settings, and presence of opportunity to consent may inhibit or diminish reasonable expectations of privacy for purposes of a cause of action for invasion of a state constitutional right of privacy.<sup>13</sup>

A state constitutional right to privacy has been held to guarantee that a competent person has a constitutional right to choose or refuse medical treatment; that right extends to all relevant decisions concerning one's health.<sup>14</sup> Medical information is protected under a state constitutional right to privacy.<sup>15</sup> A state constitution was held to support greater privacy protection for driving records than the Federal Constitution where state statutes emphasized the confidentiality of those records and limited their availability.<sup>16</sup>

On the other hand, a student-athlete who was suspended from playing after testing positive for an anabolic steroid testosterone had, under a state constitution, a diminished expectation of privacy, and the small compromise of privacy as a result of the required urine test was outweighed by the significant interest of the university and the NCAA.<sup>17</sup> Similarly, a minor child's right to privacy is not violated when a parent or guardian vicariously consents for that minor to the interception of communications,<sup>18</sup> because even though minors have a right to privacy, that right must be considered in the context of society's concern for children.<sup>19</sup>

Mortgagors have been held to have no state constitutional right of privacy against a mortgage lender's disclosure of financial records relating to the mortgage, especially where the lender is not a government entity but a privately owned bank.<sup>20</sup> An injunction requiring a condominium owner, who has serially rented rooms in his or her condominium, to comply with a condominium declaration requiring single-family dwellings does not violate the owner's state constitutional right to privacy where the renters do not meet the definition of "family" in the municipal code, the owner has engaged in commercial activity prohibited by the declaration, and the injunction is rationally related to the subdivision's right to maintain its family character.<sup>21</sup>

Usually, the test of whether a fundamental right of privacy under a state constitution is outweighed by a compelling state interest is whether there is such an interest in discovering the information; the public interest in preserving confidential information must outweigh in importance the interest of the private litigant.<sup>22</sup>

Footnotes

- 1 [State v. Mariano](#), 114 Haw. 271, 160 P.3d 1258 (Ct. App. 2007).
- 2 [Favalora v. Sidaway](#), 996 So. 2d 895 (Fla. 4th DCA 2008) (the state constitution affords Floridians the right of privacy and ensures that each person has the right to determine for themselves when, how, and to what extent information about them is communicated to others); [State Journal-Register v. University of Illinois Springfield](#), 373 Ill. Dec. 936, 994 N.E.2d 705, 297 Ed. Law Rep. 468 (App. Ct. 4th Dist. 2013).
- 3 [Warfield v. Peninsula Golf & Country Club](#), 10 Cal. 4th 594, 42 Cal. Rptr. 2d 50, 896 P.2d 776 (1995); [State v. Conforti](#), 688 So. 2d 350 (Fla. 4th DCA 1997); [In re Detention of D.A.H.](#), 84 Wash. App. 102, 924 P.2d 49 (Div. 1 1996).
- 4 [State v. Planned Parenthood of Alaska](#), 171 P.3d 577 (Alaska 2007); [State v. Ellis](#), 2009 MT 192, 351 Mont. 95, 210 P.3d 144 (2009).
- 5 [In re Carmen M.](#), 141 Cal. App. 4th 478, 46 Cal. Rptr. 3d 117 (2d Dist. 2006).
- 6 [Pettus v. Cole](#), 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46 (1st Dist. 1996), as modified on denial of reh'g, (Oct. 15, 1996); [T.L.S. v. Montana Advocacy Program](#), 2006 MT 262, 334 Mont. 146, 144 P.3d 818 (2006); [American Legion Post #149 v. Washington State Dept. of Health](#), 164 Wash. 2d 570, 192 P.3d 306 (2008).  
Conservation license applicants did not have an objectively reasonable expectation of privacy with regard to state's collection of the last four digits of their social security numbers, and thus court would apply rational basis review to a claim that the statute requiring collection of numbers violated their constitutional right to privacy; citizens regularly provided such numbers to government entities, the numbers originated with the government, and there was no credible threat the numbers would be disclosed. [Montana Shooting Sports Ass'n, Inc. v. State](#), 2010 MT 8, 355 Mont. 49, 224 P.3d 1240 (2010).
- 7 [A.H. v. State](#), 949 So. 2d 234 (Fla. 1st DCA 2007).  
The existence of a constitutionally protected individual privacy demand is dependent upon whether society is willing to recognize one's expectation of privacy as reasonable. [Lee v. City of Missoula Police Dept.](#), 2008 MT 186, 343 Mont. 487, 187 P.3d 609 (2008).
- 8 [State v. Planned Parenthood of Alaska](#), 171 P.3d 577 (Alaska 2007).
- 9 [Sheehan v. San Francisco 49ers, Ltd.](#), 45 Cal. 4th 992, 89 Cal. Rptr. 3d 594, 201 P.3d 472 (2009).  
An invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by the strong public policy supporting transparency in government grounded in both the California Constitution and the California Public Records Act. [Marken v. Santa Monica-Malibu Unified School Dist.](#), 202 Cal. App. 4th 1250, 136 Cal. Rptr. 3d 395, 275 Ed. Law Rep. 922 (2d Dist. 2012).
- 10 [International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court](#), 42 Cal. 4th 319, 64 Cal. Rptr. 3d 693, 165 P.3d 488 (2007).  
A job applicant's expectation that a prospective employer will not divulge the applicant's personal information outside the entity except in very limited circumstances is "reasonable." [County of Los Angeles v. Los Angeles County Employee Relations Com.](#), 56 Cal. 4th 905, 157 Cal. Rptr. 3d 481, 301 P.3d 1102 (2013).  
A student-athlete who played on a university's women's basketball team did not have a reasonable expectation to her privacy, under the California Constitution, with respect to a tailbone injury, since a tailbone injury was relevant to her ability to play basketball. [Videckis v. Pepperdine University](#), 100 F. Supp. 3d 927, 323 Ed. Law Rep. 843 (C.D. Cal. 2015).
- 11 [Sheehan v. San Francisco 49ers, Ltd.](#), 45 Cal. 4th 992, 89 Cal. Rptr. 3d 594, 201 P.3d 472 (2009).
- 12 [Feminist Women's Health Center v. Superior Court](#), 52 Cal. App. 4th 1234, 61 Cal. Rptr. 2d 187 (3d Dist. 1997).
- 13 [Susan S. v. Israels](#), 55 Cal. App. 4th 1290, 67 Cal. Rptr. 2d 42 (2d Dist. 1997).
- 14 [Harrell v. St. Mary's Hosp., Inc.](#), 678 So. 2d 455 (Fla. 4th DCA 1996).  
The right to be free from intrusive medical treatment is a fundamental right encompassed by the right of privacy. [In re Conservatorship of Foster](#), 547 N.W.2d 81 (Minn. 1996).
- 15 [Universal City Development v. Williams](#), 963 So. 2d 351 (Fla. 5th DCA 2007).
- 16 [State v. Harlow](#), 85 Wash. App. 557, 933 P.2d 1076 (Div. 3 1997).

- 17 Brennan v. Board of Trustees for University of Louisiana Systems, 691 So. 2d 324, 117 Ed. Law Rep. 803  
(La. Ct. App. 1st Cir. 1997).
- 18 State v. Spencer, 737 N.W.2d 124 (Iowa 2007).
- 19 State v. Spencer, 737 N.W.2d 124 (Iowa 2007).
- 20 Stern v. Great Western Bank, 959 F. Supp. 478 (N.D. Ill. 1997).
- 21 Colony Hill v. Ghamaty, 143 Cal. App. 4th 1156, 50 Cal. Rptr. 3d 247 (4th Dist. 2006).
- 22 Pearce v. Club Med Sales, Inc., 172 F.R.D. 407 (N.D. Cal. 1997).

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## 16B Am. Jur. 2d Constitutional Law § 653

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 653. Validity of state laws and regulations affecting privacy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) , 1211, 1228 to 1272

### A.L.R. Library

[Validity, construction, and application of statutory restrictions on partial birth abortions, 76 A.L.R.5th 637](#)

[Validity, under Federal Constitution, of regulation or policy of college or university requiring students to live in dormitories or residence halls, 31 A.L.R. Fed. 813](#)

Some state regulation in areas protected by the right of privacy is permissible, but because fundamental rights are involved, any regulation limiting these rights must be justified by a compelling state interest.<sup>1</sup> A wide variety of statutes, regulations, and practices affecting both civil and criminal matters, have been challenged on the grounds of unconstitutional invasion of privacy. Where an overriding or compelling governmental interest was found, or the claim of privacy was nebulous or unsubstantiated, the statutes or regulations at issue have been sustained. Illustrative of such situations are cases involving statutes, rules, regulations, or practices pertaining to—

—prostitution.<sup>2</sup>

- confidential medical records.<sup>3</sup>
  - filing of certificates of termination of pregnancy.<sup>4</sup>
  - identification of prescription drug patients by doctors.<sup>5</sup>
  - sale and use of marijuana.<sup>6</sup>
  - involuntary commitment of mentally ill persons.<sup>7</sup>
  - public disclosure of personal financial affairs of public officials or employees<sup>8</sup> or of political contributions.<sup>9</sup>
  - state intrusion into a person's bank records under a valid warrant or subpoena.<sup>10</sup>
  - the inspection of an attorney's billing files in the investigation of alleged attorney misconduct.<sup>11</sup>
  - industrial espionage.<sup>12</sup>
  - dress and hair codes or regulations for public school students.<sup>13</sup>
  - university parietal regulations requiring dormitory residence by unmarried undergraduate students.<sup>14</sup>
  - screening procedures for determining the character and fitness of applicants for admission to the bar.<sup>15</sup>
  - fingerprinting and photographing applicants for a license to engage in the business of massage.<sup>16</sup>
- Additionally, an officer's request for identification from the passenger of a vehicle stopped for a traffic violation does not impermissibly infringe on the passenger's right to privacy.<sup>17</sup> Because an arrest warrant is a matter of public record, the subject of the warrant has no expectation of privacy in the information contained therein.<sup>18</sup>

**Observation:**

The practice of a health plan of transmitting to its attorneys medical information concerning the plan's patients who were either making or contemplating making medical malpractice claims against the plan did not violate the California Constitution's provisions protecting the right of privacy, even as to information that was arguably irrelevant.<sup>19</sup>

Conversely, where a compelling and legitimate governmental interest was not found, statutes or regulations have been struck down. Illustrative are cases involving statutes or regulations pertaining to—

- contraceptives.<sup>20</sup>

— adoption.<sup>21</sup>

— abortion.<sup>22</sup>

— showing of films containing nudity in drive-in theaters.<sup>23</sup>

**Practice Tip:**

In determining whether to order the disclosure of contact information for potential witnesses in discovery, the court must balance the public need against the weight of the right of privacy in the California Constitution, requiring a careful evaluation of the privacy right asserted, the magnitude of the imposition on that right, and the interests militating for and against any intrusion on privacy.<sup>24</sup>

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**Footnotes**

- 1 § 651.
- 2 U. S. v. Moses, 339 A.2d 46 (D.C. 1975); State v. Price, 237 N.W.2d 813 (Iowa 1976).
- 3 Doe v. Marsh, 918 F. Supp. 580 (N.D. N.Y. 1996), *aff'd*, 105 F.3d 106 (2d Cir. 1997); ACT-UP Triangle v. Commission for Health Services of the State of N.C., 345 N.C. 699, 483 S.E.2d 388 (1997).
- 4 Schulman v. New York City Health & Hospital Corp., 38 N.Y.2d 234, 379 N.Y.S.2d 702, 342 N.E.2d 501 (1975).
- 5 Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).
- 6 U.S. v. Horsley, 519 F.2d 1264 (5th Cir. 1975).
- 7 State v. O'Neill, 274 Or. 59, 545 P.2d 97 (1976).
- 8 County of Nevada v. Macmillen, 11 Cal. 3d 662, 114 Cal. Rptr. 345, 522 P.2d 1345 (1974); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975); Evans v. Carey, 53 A.D.2d 109, 385 N.Y.S.2d 965 (4th Dep't 1976), *order aff'd*, 40 N.Y.2d 1008, 391 N.Y.S.2d 393, 359 N.E.2d 983 (1976).
- 9 Buettell v. Walker, 59 Ill. 2d 146, 319 N.E.2d 502 (1974).
- 10 Schroeder v. Utah Attorney General's Office, 2015 UT 77, 358 P.3d 1075 (Utah 2015).
- 11 In re Disciplinary Proceeding Against Poole, 164 Wash. 2d 710, 193 P.3d 1064 (2008).
- 12 Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974).
- 13 Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972); King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1971).
- 14 As to the regulation of student clothing and hair styles, generally, see Am. Jur. 2d, Schools §§ 309 to 313. Prostrullo v. University of South Dakota, 507 F.2d 775, 31 A.L.R. Fed. 802 (8th Cir. 1974); Pratz v. Louisiana Polytechnic Institute, 316 F. Supp. 872 (W.D. La. 1970), *case dismissed*, 401 U.S. 951, 91 S. Ct. 1186, 28 L. Ed. 2d 234 (1971) and *judgment aff'd*, 401 U.S. 1004, 91 S. Ct. 1252, 28 L. Ed. 2d 541 (1971); Poynter v. Drevdahl, 359 F. Supp. 1137 (W.D. Mich. 1972).
- 15 Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971).
- 16 Brown v. Brannon, 399 F. Supp. 133 (M.D. N.C. 1975), *aff'd*, 535 F.2d 1249 (4th Cir. 1976).
- 17 State v. Thigpen, 963 So. 2d 478 (La. Ct. App. 2d Cir. 2007).
- 18 People v. Bailey, 232 Ill. 2d 285, 328 Ill. Dec. 22, 903 N.E.2d 409 (2009).

- 19 California Consumer Health Care Council v. Kaiser Foundation Health Plan, Inc., 142 Cal. App. 4th 21, 47  
Cal. Rptr. 3d 593 (1st Dist. 2006).
- 20 Am. Jur. 2d, Abortion and Birth Control § 5.
- 21 Arkansas Dept. of Human Services v. Cole, 2011 Ark. 145, 380 S.W.3d 429 (2011) (law prohibiting an  
individual from adopting or serving as a foster parent if that individual was "cohabiting with a sexual partner  
outside of a marriage that is valid under the Arkansas Constitution and the laws of this state").
- 22 Am. Jur. 2d, Abortion and Birth Control § 6.
- 23 Erznosnik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).
- 24 Crab Addison, Inc. v. Superior Court, 169 Cal. App. 4th 958, 87 Cal. Rptr. 3d 400 (2d Dist. 2008).

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## 16B Am. Jur. 2d Constitutional Law § 654

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 654. Relation of right of privacy to federal statutes, rules, and constitutional rulings

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  727, 1211

Questions of privacy sometimes are relevant in construing federal statutes such as the Omnibus Crime Control and Safe Streets Act,<sup>1</sup> the Presidential Recordings and Materials Preservation Act,<sup>2</sup> the Bank Secrecy Act,<sup>3</sup> statutes relating to obscene materials,<sup>4</sup> or the Federal Communications Act,<sup>5</sup> as well as in construing federal rules such as the Federal Rules of Civil Procedure.<sup>6</sup>

### Practice Tip:

To properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.<sup>7</sup>



Footnotes

- 1 [U. S. v. Kahn](#), 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974); [Gelbard v. U. S.](#), 408 U.S. 41, 92 S. Ct. 2357, 33 L. Ed. 2d 179 (1972); [U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division](#), 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).
- 2 [Nixon v. Administrator of General Services](#), 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).
- 3 [U.S. v. Miller](#), 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976).
- 4 [Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 4.](#)
- 5 [Rathbun v. U.S.](#), 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957).  
A tape recording of a telephone conversation between a defendant and a confidential informant, with the informant's permission, did not violate the defendant's right to privacy under either the Fourth Amendment or the state constitution. [State v. Andrews](#), 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996).
- 6 [Schlagenhauf v. Holder](#), 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152, 9 Fed. R. Serv. 2d 35A.1, Case 1 (1964).
- 7 [Toffoloni v. LFP Publishing Group, LLC](#), 572 F.3d 1201 (11th Cir. 2009) (applying Georgia law).

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## 16B Am. Jur. 2d Constitutional Law § 655

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 655. Applicability of right of privacy to corporations and other organizational entities

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) , 727, 1225

Corporations and other organizational entities ordinarily do not enjoy constitutional rights of privacy, at least not to the same extent as individuals.<sup>1</sup> Thus, the Federal Trade Commission has the power to require a corporation to file a report showing how it has complied with a court decree enforcing the Commission's cease-and-desist order,<sup>2</sup> and a substantial claim of privacy cannot be maintained with respect to the financial records of an organized collective entity.<sup>3</sup> On the other hand, while it has been recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context, it cannot be claimed that corporations are without some Fourth Amendment rights. Thus, it has been held that there is no broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in furtherance of enforcement of the tax laws, and in this respect there is no justification for treating a corporation differently from a private individual.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.](#), 42 Cal. App. 4th 1260, 50 Cal. Rptr. 2d 366 (2d Dist. 1996), as modified on denial of reh'g, (Mar. 28, 1996) (the constitutional guarantee of the right of privacy does not apply to corporations, and consequently, a medical clinic, as a corporation rather than an individual, does not have any constitutional privacy right in its financial records); [Colorado Department of Labor and Employment v. Dami Hospitality, LLC](#), 2019 CO 47M, 442 P.3d 94 (Colo. 2019), as modified on denial of

reh'g, (June 17, 2019) and cert. denied, [140 S. Ct. 849, 205 L. Ed. 2d 467 \(2020\)](#) and cert. denied, [140 S. Ct. 900, 205 L. Ed. 2d 467 \(2020\)](#) (constitutional guarantees that are purely personal or limited to the protection of individuals, such as the right to privacy, do not apply to corporations).

2 [U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 \(1950\).](#)

3 [Bellis v. U. S., 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed. 2d 678 \(1974\).](#)

4 [G. M. Leasing Corp. v. U. S., 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 \(1977\).](#)

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## 16B Am. Jur. 2d Constitutional Law § 656

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 4. Right of Privacy

## § 656. Applicability of right of privacy to employees of corporations and other organizational entities

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  727, 1225, 1232, 1252 to 1258

Employers have important and legitimate interests in maintaining an efficient and productive workforce, and they consequently have substantial latitude in regulating employees' on-the-job conduct and working relationships, despite the constitutional right to privacy.<sup>1</sup> Constitutional protections of a reasonable expectation of privacy do not extend to an individual's place of business.<sup>2</sup> An employer does not violate an employee's constitutional right to privacy by requiring the employee to provide his or her Social Security number on an employment form.<sup>3</sup> Also, employees lack any objectively reasonable expectation of privacy against a disclosed, soundless video surveillance while toiling in an open and undifferentiated work area because they lack any fundamental right to be free from surveillance.<sup>4</sup>

Employers do have a legitimate and compelling interest in maintaining a safe working environment for their employees, for purposes of justifying an invasion of the employees' constitutional right to privacy. However, employers do not have any cognizable interest, for purposes of justifying an invasion of the constitutional right to privacy in dictating the course of medical treatment for employees who suffer nonindustrial injuries, inasmuch as employees have the right to decide such matters in consultation with their own health care providers, who are medical professionals who have their patients' best interests at heart.<sup>5</sup>

**Observation:**

Individuals, such as family members, who do not participate in corporate matters that might reasonably become the subject of government inquiry have a greater "reasonable expectation of privacy" in their personal financial affairs than do those individuals who, as corporate employees or directors, do participate in such matters.<sup>6</sup>

The privacy guarantee in a state constitution, while applicable to prohibit disclosure of information in employees' personnel files, may apply only to state action.<sup>7</sup> On the other hand, a constitution may make private parties liable for violations to the dignity and privacy protections of their employees.<sup>8</sup>

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**Footnotes**

- 1 [Pettus v. Cole](#), 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46 (1st Dist. 1996), as modified on denial of reh'g, (Oct. 15, 1996).
- 2 [Avrich v. State](#), 936 So. 2d 739 (Fla. 3d DCA 2006).
- 3 [McCauley v. Computer Aid, Inc.](#), 242 Fed. Appx. 810 (3d Cir. 2007).
- 4 [Vega-Rodriguez v. Puerto Rico Telephone Co.](#), 110 F.3d 174 (1st Cir. 1997).
- 5 [Pettus v. Cole](#), 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46 (1st Dist. 1996), as modified on denial of reh'g, (Oct. 15, 1996).
- 6 [In re McVane](#), 44 F.3d 1127 (2d Cir. 1995).
- 7 [Ivins v. Corrections Corp. of America](#), 291 F.R.D. 517 (D. Mont. 2013) (Montana Constitution).
- 8 [Bonilla-Olmedo v. U.S.](#), 677 F. Supp. 2d 511 (D.P.R. 2009) (Puerto Rico Constitution).

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## 16B Am. Jur. 2d Constitutional Law § 657

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 657. Nature of right to travel freely

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1280 to 1288

The right of a citizen of one state to pass into any other state of the Union or to reside therein for the purpose of engaging in lawful commerce, trade, or business without molestation is secured and protected by the United States Constitution.<sup>1</sup> The right to travel has three components: (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state.<sup>2</sup> Citizens have a fundamental right of free movement.<sup>3</sup> Sometimes referred to as the "right to migrate," this right protects residents of a state from being disadvantaged or from being treated differently, simply because of the timing of their migration, from other similarly situated residents,<sup>4</sup> and it protects interstate travelers from the erection of actual barriers to interstate movement.<sup>5</sup>

### Caution:

The right to travel, being a personal liberty interest, has not been extended, for example, to protect the interstate sale of goods.<sup>6</sup> Moreover, there is no constitutional right to a particular mode or manner of travel.<sup>7</sup>

This right to travel is a fundamental right subject to the strict scrutiny test under the United States Constitution.<sup>8</sup> However, minor restrictions on travel, including delays and costs,<sup>9</sup> do not amount to a denial of the fundamental right to interstate travel.<sup>10</sup> A state law implicates the constitutional right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right.<sup>11</sup> Thus, in addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer-term residents.<sup>12</sup>

**Observation:**

The federal guarantee of interstate travel does not transform state law torts into federal offenses when they are intentionally committed against interstate travelers; rather, it protects interstate travelers against two sets of burdens—the erection of actual barriers to interstate movement and being treated differently from intrastate travelers.<sup>13</sup>

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**Footnotes**

- 1 [Attorney General of New York v. Soto-Lopez](#), 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986); [Jones v. Helms](#), 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981); [Bigelow v. Virginia](#), 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975); [Memorial Hospital v. Maricopa County](#), 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974); [Dunn v. Blumstein](#), 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); [Griffin v. Breckenridge](#), 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); [Oregon v. Mitchell](#), 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970); [Costa v. Bluegrass Turf Service, Inc.](#), 406 F. Supp. 1003 (E.D. Ky. 1975); [In re King](#), 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970); [State v. Barker](#), 252 Kan. 949, 850 P.2d 885 (1993).
- 2 [Peruta v. County of San Diego](#), 678 F. Supp. 2d 1046 (S.D. Cal. 2010); [Harper v. Booth](#), 382 F. Supp. 3d 124 (D. Mass. 2019); [Somers v. Superior Court](#), 172 Cal. App. 4th 1407, 92 Cal. Rptr. 3d 116 (1st Dist. 2009); [Bartosz v. Jones](#), 146 Idaho 449, 197 P.3d 310 (2008); [Behm v. City of Cedar Rapids](#), 922 N.W.2d 524 (Iowa 2019); [Bedeau v. Evans](#), 926 N.W.2d 425 (Minn. Ct. App. 2019); [State v. Harris](#), 284 Neb. 214, 817 N.W.2d 258 (2012); [State v. Chettero](#), 2013 UT 9, 297 P.3d 582 (Utah 2013).
- 3 [Nunez by Nunez v. City of San Diego](#), 114 F.3d 935 (9th Cir. 1997); [Hornbeck v. Somerset County Bd. of Educ.](#), 295 Md. 597, 458 A.2d 758, 10 Ed. Law Rep. 592 (1983); [Com. v. Weston W.](#), 455 Mass. 24, 913 N.E.2d 832 (2009); [Greene v. Commissioner of Minnesota Dept. of Human Services](#), 755 N.W.2d 713 (Minn. 2008); [Bell v. Bell](#), 572 So. 2d 841 (Miss. 1990); [Town of Beech Mountain v. County of Watauga](#),

- 324 N.C. 409, 378 S.E.2d 780 (1989); *Brandmiller v. Arreola*, 189 Wis. 2d 215, 525 N.W.2d 353 (Ct. App. 1994), decision *aff'd*, 199 Wis. 2d 528, 544 N.W.2d 894 (1996).
- 4 *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986).
- 5 *State v. Willard*, 756 N.W.2d 207 (Iowa 2008).
- 6 *McCoy-Elkhorn Coal Corp. v. U.S. Environmental Protection Agency*, 622 F.2d 260 (6th Cir. 1980).
- 7 *State v. Meints*, 223 Neb. 199, 388 N.W.2d 813 (1986); *State v. Scheffél*, 82 Wash. 2d 872, 514 P.2d 1052 (1973).
- 8 *In re U. S. ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147, 5 Ed. Law Rep. 383 (8th Cir. 1982); *In re Merrill Lynch Relocation Management, Inc.*, 812 F.2d 1116 (9th Cir. 1987); *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079 (E.D. Cal. 2012); *Smith v. District of Columbia*, 387 F. Supp. 3d 8 (D.D.C. 2019); *Angus Partners LLC v. Walder*, 52 F. Supp. 3d 546 (S.D. N.Y. 2014); *Behm v. City of Cedar Rapids*, 922 N.W.2d 524 (Iowa 2019); *In re Contest of November 8, 2011 General Election of Office of New Jersey General Assembly*, 210 N.J. 29, 40 A.3d 684 (2012); *Rowitz v. McClain*, 2019-Ohio-5438, 138 N.E.3d 1241 (Ohio Ct. App. 10th Dist. Franklin County 2019); *State v. Alphonse*, 142 Wash. App. 417, 174 P.3d 684 (Div. 1 2008).
- 9 *Owner Operator Independent Drivers Association, Inc. v. Pennsylvania Turnpike Commission*, 934 F.3d 283 (3d Cir. 2019), cert. denied, 140 S. Ct. 959 (2020).
- 10 *Joseph v. Hyman*, 659 F.3d 215 (2d Cir. 2011); *Owner Operator Independent Drivers Association, Inc. v. Pennsylvania Turnpike Commission*, 934 F.3d 283 (3d Cir. 2019), cert. denied, 140 S. Ct. 959 (2020); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991); *Kovac v. Wray*, 363 F. Supp. 3d 721 (N.D. Tex. 2019).  
A durational residency requirement for preferential rates for mooring privileges in recreational boat harbors is not a significant penalty on the fundamental right to travel. *Hawaii Boating Ass'n v. Water Transp. Facilities Division, Dept. of Transp., State of Hawaii*, 651 F.2d 661 (9th Cir. 1981).  
A police officer's random registration check on the defendant's out-of-state vehicle does not impede the defendant's right to interstate travel. *U.S. v. Walraven*, 892 F.2d 972 (10th Cir. 1989).
- 11 *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986); *Smith v. District of Columbia*, 387 F. Supp. 3d 8 (D.D.C. 2019); *Owner Operator Independent Drivers Association, Inc. v. Pennsylvania Turnpike Commission*, 383 F. Supp. 3d 353 (M.D. Pa. 2019), *aff'd*, 934 F.3d 283 (3d Cir. 2019), cert. denied, 140 S. Ct. 959 (2020); *Lee v. Commissioner of Revenue*, 395 Mass. 527, 481 N.E.2d 183 (1985); *Schatz v. Interfaith Care Center*, 811 N.W.2d 643 (Minn. 2012); *Rowitz v. McClain*, 2019-Ohio-5438, 138 N.E.3d 1241 (Ohio Ct. App. 10th Dist. Franklin County 2019).
- 12 *Zobel v. Williams*, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982).
- 13 *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34, 169 A.L.R. Fed. 649 (1993).

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## 16B Am. Jur. 2d Constitutional Law § 658

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 658. Constitutional basis of right to travel freely

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1280 to 1288

The constitutional basis of the right of travel is said to rest on a variety of constitutional provisions, including the Privileges and Immunities Clause of Article IV, § 2 of the Constitution,<sup>1</sup> the Privileges and Immunities Clause of the 14th Amendment,<sup>2</sup> and the Due Process Clause of the Fifth Amendment.<sup>3</sup> Other cases have suggested that the right of interstate travel is based on general constitutional principles or have considered it unnecessary to base this right on any particular constitutional provision.<sup>4</sup> In at least one case, a state court has ascribed the right to travel and to live where one chooses to the penumbra of rights which the supreme court has found and declared to be fundamental around the Bill of Rights.<sup>5</sup> Likewise, another court has stated that the right to travel, to go from place to place, is a natural right, though subject to the rights of others and to reasonable regulation under law.<sup>6</sup>

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### Footnotes

<sup>1</sup> [Hess v. Pawloski](#), 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927); [Shaffer v. Carter](#), 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920); [Nagl v. Industrial Claim Appeals Office](#), 2015 COA 51, 351 P.3d 577 (Colo. App. 2015).

As to the privileges and immunities of citizenship, generally, see §§ [783](#) to [789](#).

- 2                    *Twining v. State of N.J.*, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908) (overruled in part on other grounds  
by, *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)); *Doe v. Neer*, 649 F. Supp. 2d  
952 (E.D. Mo. 2009).
- 3                    *State v. Barker*, 252 Kan. 949, 850 P.2d 885 (1993).
- 4                    *Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); *U.S. v. Guest*, 383 U.S. 745,  
86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).
- 5                    *Allison v. City of Akron*, 45 Ohio App. 2d 227, 74 Ohio Op. 2d 343, 343 N.E.2d 128 (9th Dist. Summit  
County 1974).
- 6                    *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955).

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## 16B Am. Jur. 2d Constitutional Law § 659

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 659. Persons protected by right of travel

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑1280

Whatever may be the scope or basis of the constitutional right of interstate travel, all citizens,<sup>1</sup> including new residents<sup>2</sup> and aliens lawfully within the United States, have a right to enter and abide in any state on an equality of legal privileges with all other citizens under nondiscriminatory laws.<sup>3</sup> Minors are protected by the right to travel,<sup>4</sup> with, however, reduced expectations in some instances; and mental patients retain the constitutionally guaranteed right to freedom of bodily movement.<sup>5</sup> In fact, all persons, including indigents and other migrants, have a right of free travel.<sup>6</sup>

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### Footnotes

- 1 [Attorney General of New York v. Soto-Lopez](#), 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986); [Jones v. Helms](#), 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981); [People v. Relkin](#), 6 Cal. App. 5th 1188, 211 Cal. Rptr. 3d 879 (3d Dist. 2016); [City of Seattle v. McConahy](#), 86 Wash. App. 557, 937 P.2d 1133 (Div. 1 1997).  
All Florida citizens have a right under the Florida Constitution to chat on a public street, to stroll aimlessly, and to saunter down a sidewalk. [Catron v. City of St. Petersburg](#), 658 F.3d 1260 (11th Cir. 2011).
- 2 [Zobel v. Williams](#), 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982).
- 3 [Graham v. Richardson](#), 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).
- 4 [Johnson v. City of Opelousas](#), 658 F.2d 1065, 32 Fed. R. Serv. 2d 879 (5th Cir. 1981).

5                                      Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985); State v. J.D., 86 Wash. App. 501, 937 P.2d 630 (Div. 1 1997).  
6                                      Garren v. State, 245 Ga. 323, 264 S.E.2d 876 (1980).

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## 16B Am. Jur. 2d Constitutional Law § 660

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 660. Intrastate travel as constitutional right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1280, 1283

Many state courts<sup>1</sup> and a number of federal courts have considered and reached differing conclusions as to whether the Federal Constitution guarantees the fundamental right of intrastate travel.<sup>2</sup> The Supreme Court has declined to decide the issue.<sup>3</sup>

Residency requirements for candidates for public office<sup>4</sup> and for various public employees<sup>5</sup> have been sustained. However, some juvenile curfew ordinances have been held to impinge on minors' fundamental rights of free movement and to travel intrastate and therefore to be subject to a strict scrutiny analysis for purposes of evaluating the minors' equal protection challenge.<sup>6</sup> A "sitting ordinance" that prohibits sitting or lying on a sidewalk in the downtown or other neighborhood commercial zones between 7:00 a.m. and 9:00 p.m. does not implicate the constitutional right to travel since it does not exact a penalty for moving within the state or prohibit a homeless person from living on the street and does not increase the difficulty of migrating from one state to another.<sup>7</sup> A local "anticruising" ordinance is a reasonable time, place, and manner restriction on the right of localized intrastate travel.<sup>8</sup> A number of state constitutions contain provisions establishing a state constitutional right to travel within the state.<sup>9</sup>

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### Footnotes

- 1 In re Marriage of Guffin, 2009 MT 169, 350 Mont. 489, 209 P.3d 225 (2009) (intrastate travel is constitutionally guaranteed); Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728 (2008) (right to intrastate travel is constitutionally guaranteed); State v. Holbach, 2009 ND 37, 763 N.W.2d 761 (N.D. 2009) (right to travel intrastate is guaranteed but may be restricted); City of Seattle v. McConahy, 86 Wash. App. 557, 937 P.2d 1133 (Div. 1 1997).
- 2 Town of West Hartford v. Operation Rescue, 991 F.2d 1039 (2d Cir. 1993); Lutz v. City of York, Pa., 899 F.2d 255, 87 A.L.R.4th 1081 (3d Cir. 1990); Townes v. City of St. Louis, 949 F. Supp. 731 (E.D. Mo. 1996), aff'd, 112 F.3d 514 (8th Cir. 1997).
- 3 Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974).  
As to whether the right of locomotion or movement is part of the "liberty" guaranteed by the Due Process Clauses, see § 623.
- 4 Am. Jur. 2d, Elections § 259.
- 5 § 663.
- 6 Nunez by Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997); Jiovon Anonymous ex rel. Thomas Anonymous v. City of Rochester, 56 A.D.3d 139, 865 N.Y.S.2d 804 (4th Dep't 2008), aff'd on other grounds, 13 N.Y.3d 35, 886 N.Y.S.2d 648, 915 N.E.2d 593 (2009).  
The right of "all citizens" to be free to travel within and between states, uninhibited by statutes or regulations which unreasonably burden this movement, extends in some measures to juveniles as citizens of the United States. Johnson v. City of Opelousas, 658 F.2d 1065, 32 Fed. R. Serv. 2d 879 (5th Cir. 1981).
- 7 City of Seattle v. McConahy, 86 Wash. App. 557, 937 P.2d 1133 (Div. 1 1997).
- 8 Lutz v. City of York, Pa., 899 F.2d 255, 87 A.L.R.4th 1081 (3d Cir. 1990); Brandmiller v. Arreola, 189 Wis. 2d 215, 525 N.W.2d 353 (Ct. App. 1994), decision aff'd, 199 Wis. 2d 528, 544 N.W.2d 894 (1996).
- 9 Bruno v. Civil Service Com'n of City of Bridgeport, 192 Conn. 335, 472 A.2d 328 (1984).

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## 16B Am. Jur. 2d Constitutional Law § 661

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 661. International travel as constitutional right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1280, 1284

The right to travel outside the United States (and to have a passport allowing it) is part of the "liberty" of which a United States citizen cannot be deprived without due process of law under the Fifth Amendment;<sup>1</sup> if that "liberty" is to be regulated, it must be pursuant to the lawmaking functions of the Congress, and if the power to regulate is delegated, such delegation must be accompanied by standards which are adequate to pass scrutiny by accepted standards. However, the right to travel abroad is not absolute,<sup>2</sup> and the President, by acting through the Secretary of State, has authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States.<sup>3</sup> For instance, a federal statute prohibiting traveling in foreign commerce with the intent to engage in sex with a minor between the ages of 12 and 16 is not facially unconstitutional as an undue restriction on the defendant's right to travel internationally.<sup>4</sup> Also, the "No Fly List," a register of persons compiled by the Terrorism Screening Center who are prohibited from flying on commercial airlines, is reasonably related to a rational government interest in preventing terrorist attacks against commercial aviation and, thus, does not violate a United States citizen's substantive due process rights as it applies to international travel.<sup>5</sup> As another example, while a news reporter's right to travel abroad is a part of freedom of the press, it does not mean that he or she can go anywhere he or she wishes; the right is subject to reasonable restrictions by the government.<sup>6</sup> The United States also may enter into treaties governing international travel.<sup>7</sup>

**Observation:**

The freedom of international travel is not basically equivalent to the constitutional right to interstate travel, since even though the constitutional right of interstate travel is virtually unqualified, nevertheless the "right" of international travel, which has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment, can be regulated within the bounds of due process; thus, legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel, such as durational residency requirements imposed by the states.<sup>8</sup>

Although the Constitution inhibits every state's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States; the power of Congress to prevent travel of aliens into the United States cannot seriously be questioned.<sup>9</sup> Thus, a section of the Federal Social Security Act which prohibits Supplemental Security Income (SSI) payments for the needy, aged, blind, and disabled for any month that the recipient spends entirely outside the United States<sup>10</sup> does not impose an impermissible burden on the freedom of international travel and is constitutional.<sup>11</sup> Likewise, a provision of the Social Security Act which denies eligibility for the Medicare supplemental medical insurance program to aliens who are 65 or older unless such aliens have been admitted for permanent residence and also have resided in the country for at least five years<sup>12</sup> is constitutional because, whereas the Constitution inhibits every state's power to restrict travel across its own borders, Congress has power to exercise such type of control over travel across the borders of the United States.<sup>13</sup>

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**Footnotes**

- 1 In re Aircrash In Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 11 Fed. R. Evid. Serv. 875 (9th Cir. 1982).
- 2 Am. Jur. 2d, Passports § 13.
- 3 Haig v. Agee, 453 U.S. 280, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981).
- 4 U.S. v. Schneider, 817 F. Supp. 2d 586, 86 Fed. R. Evid. Serv. 821 (E.D. Pa. 2011), *aff'd*, 801 F.3d 186 (3d Cir. 2015).
- 5 Mohamed v. Holder, 266 F. Supp. 3d 868 (E.D. Va. 2017).
- 6 Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959).
- 7 Swaminathan v. Swiss Air Transport Co., Ltd., 962 F.2d 387 (5th Cir. 1992) (the application of a provision of the Warsaw Convention prescribing where an airline traveler, injured when hit on the head by a metal box which fell from an overhead compartment on an airplane, must bring suit, did not deprive the traveler of his constitutional rights to due process or travel).
- 8 Haig v. Agee, 453 U.S. 280, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981); Califano v. Aznavorian, 439 U.S. 170, 99 S. Ct. 471, 58 L. Ed. 2d 435 (1978).
- 9 Mathews v. Diaz, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).
- 10 42 U.S.C.A. § 1382(f).
- 11 Califano v. Aznavorian, 439 U.S. 170, 99 S. Ct. 471, 58 L. Ed. 2d 435 (1978).



12 42 U.S.C.A. § 1395o(2)(B).

13 Mathews v. Diaz, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).

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## 16B Am. Jur. 2d Constitutional Law § 662

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 662. Limitation or restriction on right to travel, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1280 to 1288

The constitutional right of interstate travel is not an absolute right,<sup>1</sup> and it is subject to reasonable restriction.<sup>2</sup> Laws which burden the right to travel or migrate must be shown to be necessary to further a compelling state interest in order to be sustained.<sup>3</sup> There may be instances where the governmental interests served by certain restrictions outweigh the burdens imposed upon the right of interstate travel, in which case the restrictions will not be held unconstitutional.<sup>4</sup> In an emergency situation, fundamental rights such as the right of travel may be temporarily limited or suspended.<sup>5</sup> Likewise, despite the fundamental nature of the right, there are other situations in which a state may prevent a citizen from leaving, such as when a person has been charged with or convicted of a crime within a state, he or she may be detained within that state, and returned to it if he or she is found in another state.<sup>6</sup> However, any restriction on the constitutionally protected right to travel which is not shown to be necessary to promote a compelling governmental interest will be held unconstitutional.<sup>7</sup>

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### Footnotes

- <sup>1</sup> [People of State of N. Y. v. O'Neill](#), 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959); [Harper v. Booth](#), 382 F. Supp. 3d 124 (D. Mass. 2019); [Club Gallistico de Puerto Rico Inc. v. United States](#), 414 F. Supp. 3d 191 (D.P.R. 2019); [People v. Relkin](#), 6 Cal. App. 5th 1188, 211 Cal. Rptr. 3d 879 (3d Dist. 2016); [State v. Holbach](#), 2009 ND 37, 763 N.W.2d 761 (N.D. 2009).

- 2 [People of State of N. Y. v. O'Neill](#), 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959); [Abdi v. Wray](#), 942 F.3d 1019 (10th Cir. 2019); [Halajian v. D & B Towing](#), 209 Cal. App. 4th 1, 146 Cal. Rptr. 3d 646 (5th Dist. 2012); [State v. Elliott](#), 2010 ME 3, 987 A.2d 513 (Me. 2010).
- 3 [Attorney General of New York v. Soto-Lopez](#), 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986); [In re Merrill Lynch Relocation Management, Inc.](#), 812 F.2d 1116 (9th Cir. 1987); [Smith v. Paulk](#), 705 F.2d 1279 (10th Cir. 1983); [Peruta v. County of San Diego](#), 678 F. Supp. 2d 1046 (S.D. Cal. 2010); [Smith v. District of Columbia](#), 387 F. Supp. 3d 8 (D.D.C. 2019); [Aitken v. City of Aberdeen](#), 393 F. Supp. 3d 1075 (W.D. Wash. 2019); [Bartosch v. Jones](#), 146 Idaho 449, 197 P.3d 310 (2008); [In re M.C.](#), 2015 MT 57, 378 Mont. 305, 343 P.3d 569 (2015); [In re Lauren L.](#), 79 A.D.3d 1193, 912 N.Y.S.2d 732 (3d Dep't 2010); [State v. Smith](#), 185 Wash. App. 945, 344 P.3d 1244 (Div. 2 2015).
- 4 [Shapiro v. Thompson](#), 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (overruled in part on other grounds by, [Edelman v. Jordan](#), 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)); [Markham v. Kodiak Island Borough Board of Equalization](#), 441 P.3d 943 (Alaska 2019).  
The freedom to travel within the United States, although constitutionally protected, does not mean that areas ravaged by flood, fire, or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the nation as a whole. [Zemel v. Rusk](#), 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).
- 5 [U.S. v. Chalk](#), 441 F.2d 1277 (4th Cir. 1971).
- 6 [Jones v. Helms](#), 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981); [Davis v. State](#), 248 Ga. 783, 286 S.E.2d 430 (1982).  
A malicious prosecution action which resulted in an arrest and the arrestee's release on bond which confined him to the state did not give rise to a violation of the right to travel. [Albright v. Oliver](#), 975 F.2d 343 (7th Cir. 1992), judgment aff'd, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).  
A special parole condition preventing a parolee from entering Washington except for purposes of litigation or child visitation did not infringe on the parolee's constitutional right to interstate travel. [Bagley v. Harvey](#), 718 F.2d 921 (9th Cir. 1983).
- 7 [Dunn v. Blumstein](#), 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

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## 16B Am. Jur. 2d Constitutional Law § 663

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 663. Particular governmental action as violating right to travel

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  [1280](#), [1285](#), [1287](#), [1288](#)

### A.L.R. Library

[Validity, under Federal Constitution, of regulation or policy of college or university requiring students to live in dormitories or residence halls, 31 A.L.R. Fed. 813](#)

The constitutional right of interstate travel has been relied upon as a basis for upholding the validity of federal legislation prohibiting states from disqualifying persons from voting in presidential elections because of failure to meet state residency requirements.<sup>1</sup> Generally, state action penalizing a citizen for leaving or entering a state violates the citizen's right to travel under the United States Constitution.<sup>2</sup> The right to travel has also been invoked to invalidate—

— governmental residency requirements for recipients of welfare benefits.<sup>3</sup>

— a state's dividend distribution program favoring longtime residents over new residents.<sup>4</sup>

— civil banishment.<sup>5</sup>

- a state statute punishing a nonsupporting father who remained outside the state for 30 days as a felon while punishing a nonsupporting resident father only as a misdemeanor.<sup>6</sup>
  - a condition on a juvenile's probation excluding him from the United States, his country of citizenship, during his probation period.<sup>7</sup>
  - a state statute prohibiting alcoholic beverage licensees from employing nonresidents of the state.<sup>8</sup>
  - a city's practice of ordering all persons to immediately leave the sidewalks and street in an entertainment district without consideration as to whether conditions throughout street area posed an existing, imminent, or immediate threat to public safety.<sup>9</sup>
  - a state restriction of its civil service preference to veterans who entered the armed forces while residing in that state.<sup>10</sup>
- However, a federal statute making it an offense for a felon to possess a firearm in interstate commerce has been held not to violate a defendant's constitutional right to travel from one state to another.<sup>11</sup> Also, a federal statute prohibiting traveling in foreign commerce with the intent to engage in sex with a minor between the ages of 12 and 16 is not facially unconstitutional as an undue restriction on the defendant's right to travel internationally.<sup>12</sup>

With regard to state legislation or action, no federal constitutional right of interstate travel is violated where—

- state statutes impose taxes or fees which are deemed to have merely an indirect effect upon interstate travel.<sup>13</sup>
- a statute prohibits a sex offender from living within a certain range of a school<sup>14</sup> or from knowingly entering any public park.<sup>15</sup>
- a state criminally regulates stalking.<sup>16</sup>
- a probation condition requires an individual to avoid hardware stores in the state in the same chain as the one the individual burglarized, including their parking lots.<sup>17</sup>
- the right to a real estate tax abatement to persons over 70 years of age depends on such persons having owned and occupied their homes for at least 10 years.<sup>18</sup>
- a state statute requires a nonresident plaintiff to post bond covering the anticipated costs and attorney's fees which may be awarded against him or her.<sup>19</sup>
- a whitewater rafting law requires all noncommercial rafters to file a registration statement prior to engaging in that activity.<sup>20</sup>
- a state statute authorizes a person to be compelled to appear as a witness in judicial proceedings in another state.<sup>21</sup>
- a police officer stops a motorist from traveling on a closed road.<sup>22</sup>

A bona fide residence requirement of a state statute, which is appropriately defined and uniformly applied with respect to attendance in free public schools and which permits a school district to deny tuition-free admission to its public schools for a minor who lives apart from a "parent, guardian, or other person having lawful control of him" if his or her presence in the district is "for the primary purpose of attending the public free schools," does not burden or penalize the constitutional right of interstate

travel.<sup>23</sup> A state's one-year residency requirement as a prerequisite for a divorce in the state has been sustained,<sup>24</sup> as have rules or regulations requiring local residence for continued public employment<sup>25</sup> or for unemployment insurance benefits.<sup>26</sup>

A city ordinance banning camping and storage of personal property in public areas such as parks does not violate the right of homeless persons to travel.<sup>27</sup> Similarly, a city ordinance, which addresses all persons alike, providing that it is unlawful for any person to camp in or upon any public property or public right of way does not violate the right to travel of those who are unsheltered.<sup>28</sup>

A provision of a federal statute rendering deportable any alien convicted of stalking is not facially void for vagueness as the provision does not implicate the right to travel and to interstate movement, and the provision did not prohibit stalking but rather provides for the removal of aliens who have been convicted of that offense, and, as such, is an exercise of the fundamental authority of the political branches to exclude undesirable aliens.<sup>29</sup> The constitutional right to travel does not encompass using state highways in an unrestrained manner, operating a motor vehicle without a valid driver's license, or exceeding the speed limit.<sup>30</sup>

State regulation of the practice of law which may inhibit travel does not per se constitute a constitutional violation.<sup>31</sup> A state bar admission rule prohibiting graduates of unaccredited law schools from sitting for that state's bar examination unless they have been members of the bar of a reciprocal state and have practiced there for five years, is subject to a rational basis review rather than strict scrutiny; although the rule has the practical effect of making such attorneys ineligible to practice in the state, it does not so impinge on the attorneys' freedom of movement as to trigger strict scrutiny.<sup>32</sup>

An increase in the toll for use of bridges and tunnels connecting two states does not violate residents' constitutional right to travel where the residents of each state pay the same amount of money, the increase represents a fair approximation of the use conferred, and the tolls are not excessive.<sup>33</sup> Also, a motorists' allegations that increased tolls cause and will continue to cause highway users to switch to nontoll roads in the future, but not that interstate or intrastate travel has been or will be deterred, are insufficient to state a claim for infringement of the right to travel.<sup>34</sup>

"Parietal" regulations or policies of colleges or universities requiring unmarried full-time undergraduate students to reside in campus dormitories or residence halls have been upheld against the challenge that they unconstitutionally violated the right of travel of students.<sup>35</sup> Also, a village zoning ordinance prohibiting occupancy of one-family dwellings by more than two unrelated persons but allowing occupancy by any number of persons related by blood, adoption, or marriage has been held not aimed at transients and thus not violative of a person's right of interstate travel.<sup>36</sup>

On the other hand, a workers' compensation statute which adjusted the benefits of workers' compensation recipients who moved out of the state based on the average weekly wage of the state to which the recipient moved imposed a substantial penalty upon the exercise by recipients of the right to travel out of state and was thus unconstitutional.<sup>37</sup> Likewise, a local residency requirement for the position of recreation superintendent of a city, which requirement acted to disqualify a state resident who did not reside within the city, implicated the fundamental right to travel freely within the state, did not pass the test of "strict judicial scrutiny," and was therefore invalid.<sup>38</sup>

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#### Footnotes

1 [Am. Jur. 2d, Elections § 159.](#)

2 [Bartosz v. Jones, 146 Idaho 449, 197 P.3d 310 \(2008\).](#)

- 3 Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974); Graham v.  
Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).
- 4 Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982).
- 5 Town of Huntington v. Mazzone, 17 Misc. 3d 546, 841 N.Y.S.2d 831 (Dist. Ct. 2007).
- 6 In re King, 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970).
- 7 In re James C., 165 Cal. App. 4th 1198, 81 Cal. Rptr. 3d 846 (4th Dist. 2008).
- 8 Costa v. Bluegrass Turf Service, Inc., 406 F. Supp. 1003 (E.D. Ky. 1975).
- 9 Cole v. City of Memphis, Tenn., 108 F. Supp. 3d 593 (W.D. Tenn. 2015), *aff'd*, 839 F.3d 530, 95 Fed. R.  
Serv. 3d 1780 (6th Cir. 2016).
- 10 Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986).
- 11 U.S. v. Burton, 475 F.2d 469 (8th Cir. 1973).
- 12 U.S. v. Schneider, 817 F. Supp. 2d 586, 86 Fed. R. Evid. Serv. 821 (E.D. Pa. 2011), *aff'd*, 801 F.3d 186 (3d  
Cir. 2015) (18 U.S.C.A. § 2423(b)).
- 13 Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 92 S. Ct. 1349, 31 L.  
Ed. 2d 620 (1972) (tax on emplaning airline passengers).
- 14 State v. Willard, 756 N.W.2d 207 (Iowa 2008).
- 15 Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728 (2008).
- 16 Falls v. State, 131 N.E.3d 1288 (Ind. 2019) (prosecution for stalking in which defendant was accused of  
following the victim in his vehicle for two-and-one-half hours).
- 17 People v. Moran, 1 Cal. 5th 398, 205 Cal. Rptr. 3d 491, 376 P.3d 617 (Cal. 2016).
- 18 Lee v. Commissioner of Revenue, 395 Mass. 527, 481 N.E.2d 183 (1985).
- 19 Patrick v. Lynden Transport, Inc., 765 P.2d 1375 (Alaska 1988).
- 20 Brown v. Department of Inland Fisheries and Wildlife, 577 A.2d 1184 (Me. 1990).
- 21 People of State of N. Y. v. O'Neill, 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959).
- 22 Douris v. Huff, 260 Fed. Appx. 441 (3d Cir. 2008).
- 23 Martinez v. Bynum, 461 U.S. 321, 103 S. Ct. 1838, 75 L. Ed. 2d 879, 10 Ed. Law Rep. 11 (1983).
- 24 Sosna v. Iowa, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532, 19 Fed. R. Serv. 2d 925 (1975).
- 25 McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976);  
Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545 (6th Cir. 2007); Wardwell  
v. Board of Ed. of City School Dist. of City of Cincinnati, 529 F.2d 625 (6th Cir. 1976); Pollack v. Duff,  
793 F.3d 34 (D.C. Cir. 2015); McClelland v. Paris Public Schools, 294 Ark. 292, 742 S.W.2d 907, 44 Ed.  
Law Rep. 844, 75 A.L.R.4th 263 (1988); Tiffany v. City of Payette, 121 Idaho 396, 825 P.2d 493 (1992);  
Eastham v. City of Huntington, 222 W. Va. 661, 671 S.E.2d 666 (2008).  
A statute requiring a school superintendent to reside in-state after being appointed to the position was not an  
improper restraint upon a superintendent's federal and state constitutional right to travel and migrate; there  
was no requirement that a candidate for superintendent had to have been an in-state resident for a certain  
number of years. Newport Independent School District/Newport Bd. of Educ. v. Com., 300 S.W.3d 216, 252  
Ed. Law Rep. 997 (Ky. Ct. App. 2009).  
A home-rule charter provision requiring police officers employed by a town to reside within the town did not  
unduly or unreasonably restrict the officers' fundamental rights under the state constitution to travel and to  
live where they choose. Seabrook Police Ass'n v. Town of Seabrook, 138 N.H. 177, 635 A.2d 1371 (1993).
- 26 Patino v. Catherwood, 29 N.Y.2d 331, 327 N.Y.S.2d 638, 277 N.E.2d 658 (1971).
- 27 Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995).
- 28 State v. Barrett, 302 Or. App. 23, 2020 WL 468015 (2020).
- 29 Arriaga v. Mukasey, 521 F.3d 219 (2d Cir. 2008).
- 30 State v. Wells, 965 So. 2d 834 (Fla. 4th DCA 2007); State v. Skurdal, 235 Mont. 291, 767 P.2d 304 (1988).  
A driver has no absolute constitutional right to drive a car on a public highway, and suspension of a driver's  
license for failure to pay for an automobile purchase and use tax assessment does not violate the driver's  
constitutional right to travel. Boutin v. Conway, 153 Vt. 558, 572 A.2d 905 (1990).
- 31 Salibra v. Supreme Court of Ohio, 730 F.2d 1059 (6th Cir. 1984).
- 32 Schumacher v. Nix, 965 F.2d 1262 (3d Cir. 1992).

- 33                   Wallach v. Brezenoff, 930 F.2d 1070 (3d Cir. 1991).
- 34                   Owner Operator Independent Drivers Association, Inc. v. Pennsylvania Turnpike Commission, 934 F.3d 283 (3d Cir. 2019), cert. denied, 140 S. Ct. 959 (2020).
- 35                   Pratz v. Louisiana Polytechnic Institute, 316 F. Supp. 872 (W.D. La. 1970), case dismissed, 401 U.S. 951, 91 S. Ct. 1186, 28 L. Ed. 2d 234 (1971) and judgment aff'd, 401 U.S. 1004, 91 S. Ct. 1252, 28 L. Ed. 2d 541 (1971); Poynter v. Drevdahl, 359 F. Supp. 1137 (W.D. Mich. 1972).
- 36                   Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).
- 37                   Alaska Pacific Assur. Co. v. Brown, 687 P.2d 264 (Alaska 1984).
- 38                   Bruno v. Civil Service Com'n of City of Bridgeport, 192 Conn. 335, 472 A.2d 328 (1984).

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## 16B Am. Jur. 2d Constitutional Law § 664

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 664. Particular governmental action as violating right to travel—Child custody and visitation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑1286

The best interest of the child standard is a compelling state interest that can restrict the constitutional right of a custodial parent to travel,<sup>1</sup> and is the most appropriate way to fairly balance parents' competing interests, when a custodial parent seeks to relocate with a child.<sup>2</sup> When a parent claims that denial of the parent's request to relocate the child would violate the parent's federal constitutional right to travel, the child's interests are powerful countervailing considerations that cannot be swept aside as irrelevant, and the court should also balance the nonrelocating parent's federal constitutional interest in parenting.<sup>3</sup> Nevertheless, an injunction issued in a postdivorce proceeding which permanently enjoins a former spouse from traveling outside the continental United States without the other former spouse's consent, will be struck down as violative of the constitutional right to travel where it is overly broad, unreasonably restrictive, and unrelated to either the child's best interest or the prevention of international child-abduction prevention.<sup>4</sup>

A statute governing custody of a child when a divorced parent seeks to remove and relocate out of state with the child, over the other parent's objection, did not infringe upon the mother's due process right to interstate travel; the statute did not constrain the mother's right to travel, rather, it placed a limitation upon her claimed right to permanently relocate her children out of state without the court's approval.<sup>5</sup>

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### Footnotes

- 1                    [Bartosz v. Jones](#), 146 Idaho 449, 197 P.3d 310 (2008); [In re C.J.](#), 2016 MT 93, 383 Mont. 197, 369 P.3d 1028 (2016); [In re Marriage of Fedorov](#), 228 Or. App. 50, 206 P.3d 1124 (2009).
- A geographical restriction in a court-ordered parenting plan, requiring that the mother's allotted three-day holiday weekends of custody during the school year had to be exercised within Missouri, not Texas, was not improper; the out-of-wedlock child's best interests took precedence in custody proceeding over the mother's asserted right to travel, and the trial court did not consider it to be in the child's best interest to be subjected to excessive travel during the school year. [In re C.H.](#), 412 S.W.3d 375 (Mo. Ct. App. E.D. 2013).
- The trial court did not violate a mother's constitutional rights to travel and to familial association by awarding custody of her children to their father based on the change of circumstances resulting from the mother's planned move to a different city; the court did not change custody solely because the mother moved, but rather considered the impact the move would have on the children, and based its decision on what it reasonably believed to be in the children's best interests. [Tracy v. Tracy](#), 2017 WY 17, 388 P.3d 1257 (Wyo. 2017).
- 2                    [Bartosz v. Jones](#), 146 Idaho 449, 197 P.3d 310 (2008).
- 3                    [Baxendale v. Raich](#), 878 N.E.2d 1252 (Ind. 2008).
- 4                    [Arredondo v. Betancourt](#), 383 S.W.3d 730 (Tex. App. Houston 14th Dist. 2012).
- 5                    [Bisbing v. Bisbing](#), 230 N.J. 309, 166 A.3d 1155 (2017).

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## 16B Am. Jur. 2d Constitutional Law § 665

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 5. Freedom of Travel

## § 665. Protection of right to travel from interference by private parties

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑1280

The constitutional right of interstate travel is a right which is secured not only against governmental interference<sup>1</sup> but also against interference by private parties.<sup>2</sup> Thus, the constitutional right of travel of black citizens will be protected against interference by private parties through intimidation, threats, or assaults.<sup>3</sup> However, it has been held that a city is not required to protect a pedestrian, as member of the general public, from acts of private persons or their animals that could adversely affect the pedestrian's travel.<sup>4</sup>

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### Footnotes

- <sup>1</sup> §§ 663, 664.
- <sup>2</sup> [Griffin v. Breckenridge](#), 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); [U.S. v. Guest](#), 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).  
The right to travel is constitutionally protected against private as well as public encroachment. [Volunteer Medical Clinic, Inc. v. Operation Rescue](#), 948 F.2d 218 (6th Cir. 1991) (dealing with abortion clinic protests).
- <sup>3</sup> [Griffin v. Breckenridge](#), 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); [U.S. v. Guest](#), 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).
- <sup>4</sup> [Jaramillo v. City of McAllen, Texas](#), 306 Fed. Appx. 140 (5th Cir. 2009).

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## 16B Am. Jur. 2d Constitutional Law § 666

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 6. Free Justice and Open Courts; Remedy for All Injuries

## § 666. Guarantee of free justice and open courts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2310 to 2325

The right of access to the courts is constitutionally protected,<sup>1</sup> fundamental,<sup>2</sup> and cannot be denied,<sup>3</sup> although such right is not absolute.<sup>4</sup> The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power; thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decision-making, and this holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.<sup>5</sup> An open courts provision of a state constitution acts as an additional due process guarantee granted in the Constitution and prohibits the legislature from arbitrarily withdrawing all legal remedies from anyone having a well-defined cause of action under the common law.<sup>6</sup>

A party's constitutional right of access to the court must be adequate, effective, and meaningful.<sup>7</sup> It has been held that a state constitutional "open courts" provision includes at least three separate guarantees: (1) the courts must actually be operating and available, (2) the legislature cannot impede access to the courts through unreasonable financial barriers, and (3) meaningful remedies must be afforded so that the legislature may not abrogate the right to assert a well-established common-law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.<sup>8</sup>

To make a colorable claim of denial of access to the courts, an aggrieved party must demonstrate that the legislature has abolished a common-law right previously enjoyed by the people of the state.<sup>9</sup> A violation of a state constitution's open courts provision is established upon a showing that (1) a party has a recognized cause of action, (2) the cause of action is being restricted, and (3) the restriction is arbitrary or unreasonable.<sup>10</sup> To prevail on an "access to the courts" constitutional challenge, a litigant must

demonstrate actual injury—that is, actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.<sup>11</sup>

In most but not all<sup>12</sup> of the state constitutions there are provisions, varying slightly in terms, which stipulate that justice shall be administered to all without delay or denial, without sale or prejudice, and that the courts shall always be open to all alike.<sup>13</sup>

**Practice Tip:**

In order to establish an open courts violation, a plaintiff must satisfy two criteria: (1) that he or she has a well-recognized common-law cause of action that is being restricted, and (2) that the restriction of his or her claim is unreasonable or arbitrary when balanced against the purpose of the statute.<sup>14</sup>

A constitutional provision that right and justice shall be administered according to such guarantees is mandatory upon the departments of government. Hence, it requires that there be no unreasonable and unjustifiable delays in the administration of justice<sup>15</sup> and that a cause not be heard before a prejudiced court.<sup>16</sup> These guarantees cannot be destroyed, denied, abridged, or impaired by legislative enactments.<sup>17</sup>

The right of access to the courts is not unconditional; conditions and restrictions on each person's access are necessary to preserve the judicial resource for all other persons.<sup>18</sup> A constitutional provision guaranteeing to residents of the state the right to resort to the courts on equal terms with others does not preclude the courts from making a reasonable classification of litigants in determining whether to retain jurisdiction of actions instituted by them.<sup>19</sup> Likewise, where access to the judicial process is not essential to the exercise of a fundamental right, the legislature is free to restrict access to the judicial machinery if there is a rational basis for that restriction.<sup>20</sup> The right to access to the courts will be accorded special constitutional protection only where the right sought to be asserted through such access is a right recognized in the constitutional sense as carrying a preferred status and so entitled to special protection, and then only where there is no alternative forum in which vindication of that constitutionally protected right may be sought.<sup>21</sup>

While there is no specific reference to the right of open access to the courts in the Federal Constitution, it has long been held that such a right nonetheless exists as a necessary result of the inclusion in that document of the Due Process Clauses of the Fifth and 14th Amendments and the Equal Protection Clause of the 14th Amendment.<sup>22</sup>

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**Footnotes**

- 1 [Richmond Newspapers, Inc. v. Virginia](#), 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *In re Deepwater Horizon*, 922 F.3d 660 (5th Cir. 2019) (Florida); *Miller v. Donald*, 541 F.3d 1091 (11th Cir. 2008); *Moran v. City of Chicago*, 286 Ill. App. 3d 746, 222 Ill. Dec. 112, 676 N.E.2d 1316 (1st Dist. 1997); *Commonwealth of Kentucky v. Claycomb by and Through Claycomb*, 566 S.W.3d 202 (Ky. 2018); *Huval v. State through Department of Public Safety and Corrections, Office of State Police*, 222 So. 3d 665 (La.

2017); *Ramsbacher v. Jim Palmer Trucking*, 2018 MT 118, 391 Mont. 298, 417 P.3d 313 (2018); *Larimore Public School District No. 44 v. Aamodt*, 2018 ND 71, 908 N.W.2d 442, 352 Ed. Law Rep. 1159 (N.D. 2018); *John v. Saint Francis Hospital, Inc.*, 2017 OK 81, 405 P.3d 681 (Okla. 2017), as amended, (Oct. 25, 2017); *Hallberg v. South Dakota Board of Regents*, 2019 SD 67, 937 N.W.2d 568, 373 Ed. Law Rep. 948 (S.D. 2019); *Abraham v. Greer*, 509 S.W.3d 609 (Tex. App. Amarillo 2016).

An individual is entitled to free and unhampered access to the courts because access to the courts is a fundamental right of every citizen. *Gunter v. Morrison*, 497 F.3d 868 (8th Cir. 2007).

*Wilson v. Commissioner of Correction*, 104 Conn. App. 224, 932 A.2d 481 (2007).

*Howard v. Sharpe*, 266 Ga. 771, 470 S.E.2d 678 (1996).

A former state employee retained her constitutional right to access to the courts and to equal protection of the laws in her sexual harassment action against a sitting President of the United States for alleged conduct occurring when the President was governor of Arkansas, regardless of what her claims were or when her suit was filed, if otherwise timely filed, provided that she was not challenging actions that fell within the ambit of official presidential responsibility. *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996), judgment aff'd, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).

*Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016), aff'd, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018); *Jaramillo v. Frewing*, 347 F. Supp. 3d 827 (D.N.M. 2018); *Lee v. United Public Workers, AFSCME, Local 646, AFL-CIO*, 125 Haw. 317, 260 P.3d 1135 (Ct. App. 2011), as corrected, (Aug. 4, 2011); *Stokes v. First American Title Company of Montana, Inc.*, 2017 MT 275, 389 Mont. 245, 406 P.3d 439 (2017), cert. denied, 139 S. Ct. 93, 202 L. Ed. 2d 59 (2018); *France v. France*, 209 N.C. App. 406, 705 S.E.2d 399 (2011); *Bouchard v. Johnson*, 555 N.W.2d 81 (N.D. 1996); *State v. Macbale*, 353 Or. 789, 305 P.3d 107 (2013); *Abraham v. Greer*, 509 S.W.3d 609 (Tex. App. Amarillo 2016).

*Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

Cover-ups that prevent person who has been wronged from vindicating his rights violate the right of access to the courts protected by substantive due process. *Martin v. Unknown U.S. Marshals*, 965 F. Supp. 2d 502 (D.N.J. 2013), aff'd, 649 Fed. Appx. 239 (3d Cir. 2016).

*Gomez v. Pasadena Health Care Management, Inc.*, 246 S.W.3d 306 (Tex. App. Houston 14th Dist. 2008).

The right to court access protected by the due process clause of the Alaska Constitution is broader than the corresponding federal right, but it is ordinarily implicated only when a legislative enactment or governmental action erects a direct and insurmountable barrier in front of the courthouse doors, *Maness v. Gordon*, 325 P.3d 522 (Alaska 2014).

*Cooper v. Circuit Court of Faulkner County*, 2013 Ark. 365, 430 S.W.3d 1 (2013).

*Rogers v. Ricane Enterprises, Inc.*, 930 S.W.2d 157 (Tex. App. Amarillo 1996), as modified on reh'g, (Sept. 18, 1996) and writ denied, (Apr. 18, 1997).

*Strohm v. Hertz Corporation/Hertz Claim Management*, 685 So. 2d 37 (Fla. 1st DCA 1996).

In deciding whether a statute violates the "open courts" provision of the Utah Constitution, a court must examine the common law at the time of statehood. *Ross v. Schackel*, 920 P.2d 1159 (Utah 1996) (rejected on other grounds by, *Slingluff v. State*, 131 Haw. 239, 317 P.3d 683 (Ct. App. 2013)).

*Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901 (Mo. 2015).

*Lockett v. Evans*, 2014 OK 34, 330 P.3d 488 (Okla. 2014).

*Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754 (1996).

*Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 489 S.E.2d 310 (1997).

The open courts provision of the Maine Constitution requires that courts must be accessible for all persons alike without discrimination and must afford a speedy remedy for every wrong. *Irish v. Gimbel*, 1997 ME 50, 691 A.2d 664 (Me. 1997).

*Streetman v. Nguyen*, 943 S.W.2d 168 (Tex. App. San Antonio 1997), writ denied, (July 31, 1997).

*Blount v. State Road Dept.*, 87 So. 2d 507 (Fla. 1956).

*Day v. Day*, 12 Idaho 556, 86 P. 531 (1906); *Ex parte Ellis*, 1909 OK CR 151, 3 Okla. Crim. 220, 105 P. 184 (1909).

*Ex parte Ellis*, 1909 OK CR 151, 3 Okla. Crim. 220, 105 P. 184 (1909); *Union Savings & Investment Co. v. District Court of Salt Lake County*, 44 Utah 397, 140 P. 221 (1914).

*Miller v. Donald*, 541 F.3d 1091 (11th Cir. 2008).

- 19 Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).
- 20 Safety Net for Abused Persons v. Segura, 692 So. 2d 1038 (La. 1997).
- 21 Montgomery v. Daniels, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444 (1975).
- 22 Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) (abrogated on other grounds by, Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)).

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## 16B Am. Jur. 2d Constitutional Law § 667

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 6. Free Justice and Open Courts; Remedy for All Injuries

## § 667. Guarantee of free justice and open courts— Particular laws as constituting denial of free access

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2310, 2311, 2320

In some instances, litigants have pointed to specific laws they have alleged as infringing upon their right to free access to the courts but with only occasional limited success. For instance, there is no constitutional right to obtain a discharge of one's debts in bankruptcy; the mere fact that Congress has delegated to the United States district courts supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to the courts.<sup>1</sup> Statutory limitations or "caps" on noneconomic damages, under which a court may not award noneconomic damages exceeding a certain amount unless it finds by clear and convincing evidence that a greater award is justified, have been held not to violate a state constitutional right of access to the courts.<sup>2</sup> An automobile no-fault insurance statute does not violate an open courts provision.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [U.S. v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 \(1973\).](#)
- <sup>2</sup> [Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89 \(Colo. App. 1997\); Greist v. Phillips, 322 Or. 281, 906 P.2d 789 \(1995\).](#)  
As to whether such a statutory cap violates equal protection rights or a state constitutional provision against special legislation, see [§ 928](#).

3 [Warren v. Melville, 937 P.2d 556 \(Utah Ct. App. 1997\).](#)

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## 16B Am. Jur. 2d Constitutional Law § 668

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 6. Free Justice and Open Courts; Remedy for All Injuries

## § 668. Guarantee of free justice and open courts—Effect of court costs and fees

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2310, 2317, 2322

### A.L.R. Library

[Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 A.L.R.4th 343](#)

Legislation and orders concerning costs and fees have often been assailed under constitutional provisions insuring justice without sale. It is a general rule that reasonable costs may be imposed on litigants without violating these constitutional guarantees.<sup>1</sup> However, court filing fees may be imposed only for purposes relating to the administration of justice to conform with the constitutional right of access to the courts.<sup>2</sup> Indigents have been afforded protection in many respects so that they will not be denied access to the courts.<sup>3</sup> The state constitutions and rules of procedure in most states recognize that the courts must be open to all with legitimate disputes, not just to those who can afford to pay fees to get in.<sup>4</sup> When fundamental interests are at stake, a litigant's inability to pay the filing fee cannot be a barrier to his or her access to the judiciary.<sup>5</sup> Thus, a civil litigant's complaint, alleging that a private provider of court e-filing services imposed unfair charges, and that such fee was imposed on the litigant, states a cause of action for violation of a state constitution's open courts provision.<sup>6</sup>

A statute violates the right of equal access to the courts when for attorney's fees purposes it treats a victorious plaintiff differently from a successful defendant.<sup>7</sup> An award of attorney's fees pursuant to a commodity futures brokerage contract providing for such an award does not violate a state's public policy of open access to its courts.<sup>8</sup> Requiring an insurance company to pay a penalty and attorney's fees if compelled to pay a loss which it fails to pay within the time specified in a contract does not tend to prevent a resort to the courts, in contravention of a constitutional requirement that all courts shall be open.<sup>9</sup>

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#### Footnotes

- 1 [Lamarche v. McCarthy](#), 158 N.H. 197, 965 A.2d 992 (2008); [Malin v. La Moure County](#), 27 N.D. 140, 145 N.W. 582 (1914); [In re Lee](#), 1917 OK 458, 64 Okla. 310, 168 P. 53 (1917); [Marquardt v. Fisher](#), 135 Or. 256, 295 P. 499, 77 A.L.R. 265 (1931).  
As to the constitutionality of legislation respecting costs, generally, see [Am. Jur. 2d, Costs § 3](#).
- 2 [Safety Net for Abused Persons v. Segura](#), 692 So. 2d 1038 (La. 1997).  
A statutory filing fee is not considered an unconstitutional tax repugnant to court access if the fee is used to fund the costs of the administration of justice. [Crist v. Ervin](#), 56 So. 3d 745 (Fla. 2010), as revised on reh'g, (Jan. 20, 2011).
- 3 [Am. Jur. 2d, Costs §§ 95 to 99](#).  
As to the appointment of counsel by the court for an indigent, see [Am. Jur. 2d, Criminal Law §§ 1085, 1086](#).
- 4 [Griffin Industries, Inc. v. Honorable Thirteenth Court of Appeals](#), 934 S.W.2d 349 (Tex. 1996).
- 5 [Miller v. Donald](#), 541 F.3d 1091 (11th Cir. 2008).
- 6 [McPeters v. LexisNexis](#), 910 F. Supp. 2d 981 (S.D. Tex. 2012), on reconsideration, 11 F. Supp. 3d 789 (S.D. Tex. 2014) (Texas Constitution).
- 7 [Professional Credit Collections, Inc. v. Smith](#), 1997 OK 19, 933 P.2d 307 (Okla. 1997).
- 8 [Farmland Industries, Inc. v. Frazier-Parrott Commodities](#), 111 F.3d 588 (8th Cir. 1997).
- 9 [Union Cent. Life Ins. Co. v. Chowning](#), 86 Tex. 654, 26 S.W. 982 (1894).

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## 16B Am. Jur. 2d Constitutional Law § 669

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 6. Free Justice and Open Courts; Remedy for All Injuries

## § 669. Guarantee of remedy in court for all injuries

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2310 to 2317

A provision guaranteeing to every person a remedy by due course of law for injury done to his or her person or property (and usually also for injury done to the person's reputation) is found in the constitutions of many states.<sup>1</sup> It means that for such wrongs as are recognized by the law of the land, the courts shall be open and afford a remedy,<sup>2</sup> or that laws shall be enacted giving a certain remedy for all injuries or wrongs.<sup>3</sup> This provision was designed to implement the maxim that for every wrong there is a remedy<sup>4</sup> and to effectuate the security and enjoyment of the "inalienable rights" guaranteed by the Constitution.<sup>5</sup> It has also been said that the purpose of such a constitutional provision is to make civil remedies available and to guard against arbitrary and discriminatory infringements upon access to the courts.<sup>6</sup>

Such a provision assumes that for every injury done to an individual in his or her lands, goods, person, or reputation there is a remedy provided by law either by the statutes or by the common law<sup>7</sup> in effect at the time the state constitution was adopted.<sup>8</sup> "Remedy by due course of law" means the reparation for injury ordered by a tribunal having jurisdiction, in the due course of procedure, after a fair hearing.<sup>9</sup>

### Observation:

The right of access to federal courts is not a free-floating right but rather is subject to Congress's Article III power to set limits on federal jurisdiction, and Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them.<sup>10</sup>

A constitutional provision which guarantees a remedy for all injuries relates primarily to the assertion of affirmative rights.<sup>11</sup> Thus, the word "injury" as employed in such a constitutional declaration implies the doing of some act which constitutes an invasion of a legal right<sup>12</sup> as established by statutory or common law<sup>13</sup> and has reference to substantial invasion of rights and injuries that are not merely de minimis.<sup>14</sup> As such, the jural rights doctrine is limited to application in the areas of negligence, personal injury, or wrongful death.<sup>15</sup>

The constitutional guarantee of access to the courts and of a remedy for injuries does not warrant a remedy for every single injury.<sup>16</sup> It cannot be considered as referring to all evils which may affect humankind;<sup>17</sup> the Constitution does not provide judicial remedies for every social and economic ill.<sup>18</sup>

A state constitutional provision that that every person should have recourse for injury done to his or her person or property does not necessarily support a private cause of action and monetary remedies; rather, it guarantees a citizen the opportunity to seek judicial redress of a wrong.<sup>19</sup>

The remedy guaranteed by the Constitution must be invoked by due course of law<sup>20</sup> in appropriate proceedings in a court having jurisdiction of the matter presented for decision to afford the remedy sought.<sup>21</sup> Such constitutional guarantee of a remedy does not, however, delegate strictly legislative power to the courts,<sup>22</sup> nor does it authorize the courts to invade a legislative prerogative.<sup>23</sup> Such a provision does not create any new right but is merely a declaration of a general fundamental principle,<sup>24</sup> although it does not prohibit the creation of new causes of action by due course of law.<sup>25</sup>

It is a primary duty of the courts to safeguard the declaration of right and remedy guaranteed by a constitutional provision ensuring a remedy for all injuries,<sup>26</sup> but such a provision is not violated solely because the granting of a remedy rests in the sound discretion of a court.<sup>27</sup>

Granting political subdivisions of a state absolute immunity from suits arising from injuries occurring on their property does not violate the provision of a state constitution guaranteeing a certain remedy for personal injuries; the statute does not preclude all recovery but simply restricts the liability of one category of defendants.<sup>28</sup> Likewise, a statute immunizing government employees from liability for acts or omissions occurring during the performance of their duties except in cases of fraud or malice does not violate the "open courts" provision.<sup>29</sup>

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#### Footnotes

- 1 [Doherty v. Merck & Co., Inc.](#), 892 F.3d 493 (1st Cir. 2018); [Pulte Home Corporation v. Montgomery County, Maryland](#), 909 F.3d 685 (4th Cir. 2018) (Maryland); [In re Deepwater Horizon](#), 922 F.3d 660 (5th Cir. 2019) (Florida); [Johnson v. U.S. Food Service](#), 56 Kan. App. 2d 232, 427 P.3d 996 (2018), review granted, (Feb. 28,

2019); *Commonwealth of Kentucky v. Claycomb by and Through Claycomb*, 566 S.W.3d 202 (Ky. 2018); *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. 2018); *Ramsbacher v. Jim Palmer Trucking*, 2018 MT 118, 391 Mont. 298, 417 P.3d 313 (2018); *Larimore Public School District No. 44 v. Aamodt*, 2018 ND 71, 908 N.W.2d 442, 352 Ed. Law Rep. 1159 (N.D. 2018); *Jones v. MetroHealth Medical Center*, 2017-Ohio-7329, 89 N.E.3d 633 (Ohio Ct. App. 8th Dist. Cuyahoga County 2017); *John v. Saint Francis Hospital, Inc.*, 2017 OK 81, 405 P.3d 681 (Okla. 2017), as amended, (Oct. 25, 2017); *Kilminster v. Day Management Corp.*, 323 Or. 618, 919 P.2d 474 (1996); *Hallberg v. South Dakota Board of Regents*, 2019 SD 67, 937 N.W.2d 568, 373 Ed. Law Rep. 948 (S.D. 2019); *Abraham v. Greer*, 509 S.W.3d 609 (Tex. App. Amarillo 2016); *State ex rel. Universal Processing Services of Wisconsin, LLC v. Circuit Court of Milwaukee County*, 2017 WI 26, 374 Wis. 2d 26, 892 N.W.2d 267 (2017).

State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85 (Super. Ct. 1926); *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927); *Stewart v. Houk*, 127 Or. 589, 271 P. 998, 61 A.L.R. 1236 (1928); *Clem v. Evans*, 291 S.W. 871, 51 A.L.R. 1135 (Tex. Comm'n App. 1927).

*Stewart v. Houk*, 127 Or. 589, 271 P. 998, 61 A.L.R. 1236 (1928).

*Holland, for Use and Benefit of Williams v. Mayes*, 155 Fla. 129, 19 So. 2d 709 (1944).

As to the common-law principle that wherever the law gives a right or prohibits an injury, it also gives a remedy, generally, see *Am. Jur. 2d, Actions* § 35.

*State ex rel. Lawson v. Woodruff*, 134 Fla. 437, 184 So. 81 (1938).

*Ocasio v. Federal Exp. Corp.*, 162 N.H. 436, 33 A.3d 1139 (2011).

*Lifemark Hospitals of Florida, Inc. v. Afonso*, 4 So. 3d 764 (Fla. 3d DCA 2009); *Olson v. Ford Motor Co.*, 558 N.W.2d 491 (Minn. 1997); *Green v. Siegel, Barnett & Schutz*, 1996 SD 146, 557 N.W.2d 396 (S.D. 1996).

Under the state constitution, any statute or court decision which deprives an employee of his or her right to full legal redress, as defined by the general tort law against third parties, is absolutely prohibited. *Trankel v. State, Dept. of Military Affairs*, 282 Mont. 348, 938 P.2d 614 (1997).

*Lemuz By and Through Lemuz v. Fieser*, 261 Kan. 936, 933 P.2d 134 (1997) (the provision of the Kansas Constitution establishing the right to justice without delay preserves the right to a remedy by due course of law only as to civil causes of action that were recognized as justiciable by the common law as it existed at the time the constitution was adopted); *Ross v. Schackel*, 920 P.2d 1159 (Utah 1996) (rejected on other grounds by, *Slingluff v. State*, 131 Haw. 239, 317 P.3d 683 (Ct. App. 2013)).

*Neely v. St. Francis Hospital & School of Nursing, Inc.*, 192 Kan. 716, 391 P.2d 155 (1964).

*Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997).

*In re Peters*, 119 Minn. 96, 137 N.W. 390 (1912).

*Barnes v. Kyle*, 202 Tenn. 529, 306 S.W.2d 1 (1957).

*Slatcoff v. Dezen*, 76 So. 2d 792 (Fla. 1954); *Olson v. Ford Motor Co.*, 558 N.W.2d 491 (Minn. 1997).

*Folsom v. Bank of Greenwood*, 97 Fla. 426, 120 So. 317 (1929).

*Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817 (Ky. Ct. App. 2008).

*Whitnell v. Silverman*, 686 So. 2d 23 (La. 1996).

*Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243, 168 A.L.R. 430 (1944); *Barnes v. Kyle*, 202 Tenn. 529, 306 S.W.2d 1 (1957).

*Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972).

*Dehn Motor Sales, LLC v. Schultz*, 439 Md. 460, 96 A.3d 221 (2014).

*In re Warner's Estate*, 160 Fla. 460, 35 So. 2d 296 (1948).

*State ex rel. Watson v. Lee*, 150 Fla. 496, 8 So. 2d 19 (1942) (overruled on other grounds by, *Couse v. Canal Authority*, 209 So. 2d 865 (Fla. 1968)).

*Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243, 168 A.L.R. 430 (1944).

*Cooper v. Tampa Electric Co.*, 154 Fla. 410, 17 So. 2d 785 (1944).

The words "shall have remedy" in such a constitutional declaration have reference to such remedy as may be provided by statute or common law and do not constitute a delegation to the courts of the power to legislate in order to provide a remedy. *Barnes v. Kyle*, 202 Tenn. 529, 306 S.W.2d 1 (1957).

- 24 [Muller v. Nebraska Methodist Hospital](#), 160 Neb. 279, 70 N.W.2d 86 (1955) (overruled in part on other grounds by, [Myers v. Drozda](#), 180 Neb. 183, 141 N.W.2d 852 (1966)); [Mull v. Wienbarg](#), 66 Wyo. 410, 212 P.2d 380 (1949).
- 25 [Kirkpatrick v. Parker](#), 136 Fla. 689, 187 So. 620, 121 A.L.R. 1481 (1939).
- 26 [State ex rel. Attorney General v. City of Avon Park](#), 108 Fla. 641, 149 So. 409 (1933), modified on other grounds, 117 Fla. 565, 158 So. 159, 98 A.L.R. 230 (1934); [Noel v. Menninger Foundation](#), 175 Kan. 751, 267 P.2d 934 (1954).
- 27 [Muller v. Nebraska Methodist Hospital](#), 160 Neb. 279, 70 N.W.2d 86 (1955) (overruled in part on other grounds by, [Myers v. Drozda](#), 180 Neb. 183, 141 N.W.2d 852 (1966)).
- 28 [White v. City of Newport](#), 326 Ark. 667, 933 S.W.2d 800 (1996); [Jost v. Bailey](#), 286 Ill. App. 3d 872, 222 Ill. Dec. 69, 676 N.E.2d 1033 (2d Dist. 1997); [Mohundro v. Alcorn County](#), 675 So. 2d 848 (Miss. 1996) (overruled on other grounds by, [Little v. Mississippi Dept. of Transp.](#), 129 So. 3d 132 (Miss. 2013)).
- 29 [Ross v. Schackel](#), 920 P.2d 1159 (Utah 1996) (rejected on other grounds by, [Slingluff v. State](#), 131 Haw. 239, 317 P.3d 683 (Ct. App. 2013)).

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## 16B Am. Jur. 2d Constitutional Law § 670

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 6. Free Justice and Open Courts; Remedy for All Injuries

## § 670. Guarantee of remedy in court for all injuries—Effect of statutes of limitations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2310, 2314, 2315

### A.L.R. Library

[Medical malpractice statutes of limitation minority provisions, 71 A.L.R.5th 307](#)

In the ordinary course of events, a statute of limitations is not considered to be an unconstitutional limitation on the right of access to the court system or the guarantee of a remedy for all injuries.<sup>1</sup> However, an occurrence-based statute of limitations, imposing an absolute time limitation in every case, has been deemed an unconstitutional abrogation of a right to a complete tort remedy, which is a right guaranteed by the "open courts" provision of various state constitutions.<sup>2</sup> Also, a statute of limitations for health care liability claims has been held unconstitutional where a plaintiff, within the two-year period, does not know, or in the exercise of reasonable diligence could not have discovered, that he or she had sustained an injury as a result of malpractice,<sup>3</sup> or as applied to a patient who was a minor at the time treatment was provided.<sup>4</sup>

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Footnotes

- 1 [Mendoza v. Murphy](#), 532 F.3d 342 (5th Cir. 2008); [Morgan v. State](#), 2008 WL 660260 (Ark. 2008); [Brinkman v. Bueter](#), 879 N.E.2d 549 (Ind. 2008); [Whitnell v. Silverman](#), 686 So. 2d 23 (La. 1996); [Christiansen v. Providence Health System of Oregon Corp.](#), 344 Or. 445, 184 P.3d 1121 (2008).  
The open courts provision of the state constitution has no bearing on the issue of when a cause of action against a health care provider accrues. [State v. Thirteenth Court of Appeals](#), 933 S.W.2d 43 (Tex. 1996).  
Application of the statute of limitations for healthcare liability claims to plaintiff's wrongful death and survival claims did not violate the "open courts" provision of the state constitution; its application did not create a legislatively imposed condition upon a common-law cause of action that was impossible to meet, and plaintiff had no cause of action at common law. [Zweig v. South Texas Cardiothoracic and Vascular Surgical Associates, PLLC](#), 373 S.W.3d 605 (Tex. App. San Antonio 2012).  
A savings provision that precluded the family of a deceased patient from commencing a third wrongful death action outside the limitations period against chiropractors who treated the patient did not violate a state constitution's open courts provision in the absence of any showing that the savings provision constituted an arbitrary or unreasonable restriction on their access to the courts; the family members' argument was focused on the effect of the statutory health care affidavit requirements, and their action was already barred by the three-year statute of limitations. [State ex rel. Goldsworthy v. Kanatzar](#), 543 S.W.3d 582 (Mo. 2018).
- 2 [Schaffer by Schaffer v. A.O. Smith Harvestore Products, Inc.](#), 74 F.3d 722, 34 Fed. R. Serv. 3d 205, 1996 FED App. 0040P (6th Cir. 1996).
- 3 [Houser v. Kaufman](#), 972 N.E.2d 927 (Ind. Ct. App. 2012).
- 4 [Montalvo v. Lopez](#), 466 S.W.3d 290 (Tex. App. San Antonio 2015).  
A two-year statute of limitations applicable to medical malpractice actions, as applied to juvenile patient who had no procedural capacity to sue, violated her fundamental right of access to the courts under the open courts provision of state constitution; the patient's exclusive remedy was to file suit, through her parents or some other guardian, seeking to recover damages for the alleged malpractice, but the patient could not bring suit against her parents if they negligently failed to bring the claim within the limitations period. [Kordus v. Montes](#), 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).

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## 16B Am. Jur. 2d Constitutional Law § 671

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 6. Free Justice and Open Courts; Remedy for All Injuries

## § 671. Guarantee of remedy in court for all injuries—Person's entitled to remedy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2310, 2311, 2325

Constitutional provisions guaranteeing a remedy to every person for every injury has been applied in a variety of instances to prevent the legislature from denying redress to the courts to certain persons, including aliens,<sup>1</sup> public servants such as a police officer,<sup>2</sup> unborn viable children,<sup>3</sup> and corporations.<sup>4</sup>

Constitutional provisions guaranteeing the equal protection of the law<sup>5</sup> imply that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination.<sup>6</sup>

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### Footnotes

- <sup>1</sup> [Am. Jur. 2d, Aliens and Citizens §§ 2086, 2087.](#)
- <sup>2</sup> [State ex rel. Christian v. Barry, 123 Ohio St. 458, 9 Ohio L. Abs. 443, 175 N.E. 855, 74 A.L.R. 497 \(1931\).](#)
- <sup>3</sup> [Williams v. Marion Rapid Transit, 152 Ohio St. 114, 39 Ohio Op. 433, 87 N.E.2d 334, 10 A.L.R.2d 1051 \(1949\).](#)
- <sup>4</sup> [Surf Club v. Tatem Surf Club, 151 Fla. 406, 10 So. 2d 554 \(1942\).](#)  
The record did not support a corporation's contention that it could not afford an attorney and was being denied access to the courts by a requirement that it appear only through counsel. [LaBrie, Inc. v. Vermont Dept. of Environmental Conservation, 157 Vt. 642, 596 A.2d 354 \(1991\).](#)

As to the capacity of a corporation to sue or be sued, generally, see [Am. Jur. 2d, Corporations §§ 1850 to 1854](#).

As to the right of a foreign corporation to sue in American courts, see [Am. Jur. 2d, Foreign Corporations §§ 419, 420](#).

[§§ 817 to 912](#).

[Sexton v. Barry, 233 F.2d 220, 1 Ohio Op. 2d 231, 75 Ohio L. Abs. 71 \(6th Cir. 1956\)](#).

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## 16B Am. Jur. 2d Constitutional Law § 672

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges


#### C. Particular Fundamental Constitutional Rights

##### 7. Prohibition of Imprisonment for Debt

## § 672. Constitutional guarantees prohibiting imprisonment for debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1106

### A.L.R. Library

[Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 A.L.R.3d 926](#)

Many state constitutions contain provisions which, although varying considerably in terminology and application, generally prohibit imprisonment for debt.<sup>1</sup> Although there is no comparable provision in the United States Constitution, a federal statute<sup>2</sup> provides that no federal court may imprison a person for debt in any state wherein imprisonment for debt has been abolished.

### Caution:

Community service is not incarceration; therefore, imposition of community service does not constitute imprisonment for debt.<sup>3</sup>

In some states, the provision broadly declares "that no person shall be imprisoned for debt." Such inhibition is absolute and contains within its terms no exceptions.<sup>4</sup> In some such jurisdictions imprisonment for debt, even in cases of fraud, is held to be a violation of the state constitution.<sup>5</sup> Elsewhere, it has been held that the legislature has the power to authorize punishment, including imprisonment in some cases, under a similar constitutional provision, not as a punishment for debt but for such an intentional fraud that through it the offender obtains the property of another without compensation.<sup>6</sup> Other state constitutions except cases of fraud and make that a ground of imprisonment,<sup>7</sup> and statutes enacted in such jurisdictions permitting imprisonment of a judgment debtor guilty of fraud have been upheld as a valid exercise of legislative authority.<sup>8</sup>

**Observation:**

Although a statute is ordinarily presumed constitutional and all doubt is to be resolved in favor of its constitutionality, every doubt must be resolved in favor of a citizen in the enforcement of a constitutional provision that no person shall be imprisoned for debt.<sup>9</sup>

The provision in the Federal Constitution forbidding state impairment of the obligation of contracts has no application to state abolition of imprisonment for debt. The states have a right to abolish such imprisonment even though it may have constituted a part of the remedy for enforcing the performance of contracts. Imprisonment itself, however, is in no sense a part of the contract, and the simple release of a prisoner does not impair a contract obligation.<sup>10</sup>

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**Footnotes**

- 1 [Harvey v. Caesars Entertainment Operating Co., Inc.](#), 55 F. Supp. 3d 901 (N.D. Miss. 2014), *aff'd*, 790 Fed. Appx. 582 (5th Cir. 2019) (Mississippi); [Kizale v. Kizale](#), 254 So. 3d 233 (Ala. Civ. App. 2017); [Stehle v. Zimmerebner](#), 2016 Ark. 290, 497 S.W.3d 188 (2016); [Al Ghurair v. Zaczac](#), 255 So. 3d 485 (Fla. 3d DCA 2018); [Sentinel Offender SVCS., LLC v. Glover](#), 296 Ga. 315, 766 S.E.2d 456 (2014); [Sidebottom v. Watershed Equine, LLC](#), 564 S.W.3d 331 (Ky. Ct. App. 2018); [In re Estate of Van Note](#), 443 S.W.3d 32 (Mo. Ct. App. W.D. 2014); [Sickler v. Sickler](#), 293 Neb. 521, 878 N.W.2d 549 (2016); [Zahavi v. State](#), 131 Nev. 51, 343 P.3d 595, 131 Nev. Adv. Op. No. 7 (2015); [Collins v. Collins](#), 2018-Ohio-1512, 110 N.E.3d 999 (Ohio Ct. App. 8th Dist. Cuyahoga County 2018); [In re McLaurin](#), 467 S.W.3d 561 (Tex. App. Houston 1st Dist. 2015).  
The power of the state to abolish imprisonment for debt altogether, so far as it relates to its own process, cannot be doubted. [Mason v. Haile](#), 25 U.S. 370, 6 L. Ed. 660, 1827 WL 3030 (1827).
- 2 [28 U.S.C.A. § 2007](#).
- 3 [Davis v. State](#), 495 So. 2d 928 (Fla. 4th DCA 1986).

- 4                   State v. Vann, 150 Ala. 66, 43 So. 357 (1907); *Caughron v. Stinespring*, 132 Tenn. 636, 179 S.W. 152 (1915).  
5                   Carr v. State, 106 Ala. 35, 17 So. 350 (1895); *State v. Glenn*, 56 Ohio Misc. 2d 1, 564 N.E.2d 1149 (Mun.  
                      Ct. 1990).  
6                   State v. Owen, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997); *State v. Jones*, 242 Kan. 385, 748 P.2d 839,  
                      5 U.C.C. Rep. Serv. 2d 1479 (1988).  
                      Absent a specific statute or contractual fraud, one cannot be imprisoned for failure to pay a debt; one who  
                      acts fraudulently, however, may be imprisoned because he or she is being punished for a wrong which has  
                      been perpetrated, not for a failure to pay. *State v. Reid*, 74 Wash. App. 281, 872 P.2d 1135 (Div. 3 1994).  
7                   Ex parte Trombley, 31 Cal. 2d 801, 193 P.2d 734 (1948); *State v. Owen*, 129 Idaho 920, 935 P.2d 183 (Ct.  
                      App. 1997).  
8                   Tatlow v. Bacon, 101 Kan. 26, 165 P. 835, 14 A.L.R. 269 (1917).  
9                   State v. Riggs, 305 Ark. 217, 807 S.W.2d 32 (1991).  
10                  In re Penniman, 103 U.S. 714, 26 L. Ed. 602, 1880 WL 18864 (1880); *Beers v. Haughton*, 34 U.S. 329, 9 L.  
                      Ed. 145, 1835 WL 3250 (1835); *Mason v. Haile*, 25 U.S. 370, 6 L. Ed. 660, 1827 WL 3030 (1827); *Sturges*  
                      v. *Crowninshield*, 17 U.S. 122, 4 L. Ed. 529, 1819 WL 2136 (1819).

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## 16B Am. Jur. 2d Constitutional Law § 673

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 7. Prohibition of Imprisonment for Debt

## § 673. Purpose and construction of prohibitions on imprisonment for debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1106

### A.L.R. Library

[Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 A.L.R.3d 926](#)

Constitutional guarantees against imprisonment for debt have as their purpose the prevention of the useless and often cruel imprisonment of persons who, having honestly become indebted, are unable to pay as they undertook and promised.<sup>1</sup> The spirit of such a provision is to protect an honest debtor who is poor and has nothing with which to pay, so that the debtor should not be at the mercy of his or her creditors if his or her insolvency is bona fide, but it is not intended to shield a dishonest person who takes unconscionable advantage of another.<sup>2</sup> Every doubt should be resolved in favor of the liberty of the citizen in the enforcement of a constitutional provision that no person shall be imprisoned for debt.<sup>3</sup>

### Practice Tip:



It has been held that an attorney representing a judgment debtor must be able to prove the debtor's honest inability to pay the debt in order to invoke a constitutional prohibition against imprisonment for debt;<sup>4</sup> a defendant who is able to pay a debt but contemptuously refuses to pay may be imprisoned without violating a constitutional provision banning imprisonment for debt.<sup>5</sup>

A prohibition against imprisonment for debt applies to criminal proceedings where the criminal statute declares the nonpayment of an obligation to be a crime. The validity of such a statute is dependent upon whether the legislative objective is consistent with such a constitutional guarantee. The power to prescribe punishment in a criminal case may not be used to defeat constitutional guarantees against imprisonment for debt.<sup>6</sup> Such constitutional guarantees cannot be circumvented by indirection. Thus, the legislature has no power to declare the mere nonperformance of a contract of indebtedness a misdemeanor and to punish the commission thereof by imprisonment directly or indirectly;<sup>7</sup> such a provision cannot be evaded by the device of declaring, in a municipal ordinance or statute, a simple breach of contract to be a crime.<sup>8</sup> A statute providing a fine for the failure to pay wages in cash violates the constitutional provision against imprisonment for debt if failure to pay the fine will result in imprisonment.<sup>9</sup>

On the other hand, the constitutional provision prohibiting imprisonment for debt is not violated where the legislative purpose is to punish for an act declared criminal, not to enforce imprisonment for debt.<sup>10</sup> Imprisonment after breach of a condition of probation that the defendant make restitution is not imprisonment for debt.<sup>11</sup>

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#### Footnotes

- 1 [Ex Parte Clark](#), 20 N.J.L. 648, 1846 WL 3333 (N.J. 1846); [Burgwyn v. Hall](#), 108 N.C. 489, 13 S.E. 222 (1891).  
The provision of the Kentucky Constitution on imprisonment for debt restricts imprisonment for a debt owed in order to prevent the resurgence of debtor prisons. [Sidebottom v. Watershed Equine, LLC](#), 564 S.W.3d 331 (Ky. Ct. App. 2018).
- 2 [Ex parte Trombley](#), 31 Cal. 2d 801, 193 P.2d 734 (1948).
- 3 [Bradley v. Superior Court In and For City and County of San Francisco](#), 48 Cal. 2d 509, 310 P.2d 634 (1957).
- 4 [Santibanez v. Wier McMahon & Co.](#), 105 F.3d 234, 46 Fed. R. Evid. Serv. 517 (5th Cir. 1997) (a court is not barred from imprisoning a judgment debtor, absent evidence of the judgment debtor's inability to pay the debt); [Ex parte Buller](#), 834 S.W.2d 622 (Tex. App. Beaumont 1992) (the constitutional prohibition against imprisonment for debt does not apply unless the contemnor demonstrates his or her inability to pay).
- 5 [State v. Campbell](#), 84 Wash. App. 596, 929 P.2d 1175 (Div. 2 1997).
- 6 [Ex parte Trombley](#), 31 Cal. 2d 801, 193 P.2d 734 (1948).
- 7 [Carr v. State](#), 106 Ala. 35, 17 So. 350 (1895).
- 8 [Kansas City v. Pengilley](#), 269 Mo. 59, 189 S.W. 380 (1916).
- 9 [State v. Prudential Coal Co.](#), 130 Tenn. 275, 170 S.W. 56 (1914).
- 10 [Plapinger v. State](#), 217 Ga. 11, 120 S.E.2d 609 (1961).
- 11 [People v. Baumann](#), 176 Cal. App. 3d 67, 222 Cal. Rptr. 32 (4th Dist. 1985).

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## 16B Am. Jur. 2d Constitutional Law § 674

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 7. Prohibition of Imprisonment for Debt

## § 674. What are "debts" for purposes of prohibitions on imprisonment for debt, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑1106

### A.L.R. Library

[Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 A.L.R.3d 926](#)

The debt intended to be covered by a constitutional provision prohibiting imprisonment for debt is that which arises exclusively from a personal<sup>1</sup> contractual obligation,<sup>2</sup> express or implied,<sup>3</sup> and judgments rendered thereon.<sup>4</sup> An obligation that is a legal duty arising out of the status of the parties, as opposed to a debt, may be enforced through a court's contempt powers without violating a constitutional prohibition on imprisonment for debt.<sup>5</sup>

It has been stated that the word "debt" is of large import, including not only debts of record, judgments, and debts of specialty but also obligations under simple contract to a very wide extent.<sup>6</sup> However, a judgment is not necessarily to be treated as a debt; the origin and character of the claim are to be considered. If the claim was for debt, the clause applies.<sup>7</sup> Provisions abolishing imprisonment for debt are frequently held not to apply to obligations to pay taxes or to license fees upon occupations, privileges, and similar activities regulations enforced by fine and imprisonment.<sup>8</sup> It is generally held, however, that a person cannot be imprisoned through the failure to pay an inspection fee by making such failure to pay an offense.<sup>9</sup> Similarly, it has been held that

an obligation placed by a municipal code on landowners to pay a fee or charge for garbage and waste collection and disposal is not a tax but a charge imposed for a special service performed to the owner by the county and thus constitutes a debt within the state's constitutional prohibition against imprisonment for debt;<sup>10</sup> however, there is contrary authority.<sup>11</sup>

Automobile financial responsibility laws have been held not to violate constitutional prohibitions of imprisonment for debt.<sup>12</sup>

**Observation:**

Although there is authority to the contrary, it has been held that obligations arising from court orders entered in the course of divorce or similar proceedings, requiring the payment of temporary or permanent alimony, attorney's fees, or suit money, are not debts for the purposes of a constitutional provision against imprisonment for debt and so may be enforced by imprisonment for contempt of court.<sup>13</sup> Authority is also divided on this issue with respect to obligations created by court orders for the support of children entered in the course of divorce proceedings<sup>14</sup> and obligations created by a property settlement.<sup>15</sup>

Imprisonment for desertion and nonsupport of a child has been held not to violate the constitutional guarantee against imprisonment for debt.<sup>16</sup>

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**Footnotes**

- 1 [Payne v. State](#), 462 So. 2d 902 (Miss. 1984) (a constitutional section prohibiting imprisonment for debts is a prohibition of imprisonment for a personal obligation from one person to another other than a civil contempt of court).
- 2 [Davis v. State](#), 237 Ala. 143, 185 So. 774 (1938); [State v. Owen](#), 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997); [Ex parte Small](#), 92 Okla. Crim. 101, 221 P.2d 669 (1950); [In re Skero](#), 253 S.W.3d 884 (Tex. App. Beaumont 2008); [State v. Pike](#), 118 Wash. 2d 585, 826 P.2d 152 (1992).  
Finding an attorney in criminal contempt and sentencing him to jail for violating a stipulated order generally restricting the attorney, who was ordered by the court to pay judgment and sanctions in a frivolous lawsuit, from transferring personal assets did not violate the state constitutional provision prohibiting a person from being imprisoned based on a contractual debt. [DeGeorge v. Warheit](#), 276 Mich. App. 587, 741 N.W.2d 384 (2007).
- 3 [Voelkel v. City of Cincinnati](#), 112 Ohio St. 374, 3 Ohio L. Abs. 268, 147 N.E. 754, 40 A.L.R. 73 (1925).
- 4 [Strattman v. Studt](#), 20 Ohio St. 2d 95, 49 Ohio Op. 2d 428, 253 N.E.2d 749 (1969).  
Enforcement of court decrees or orders as violating prohibition against imprisonment for debt, generally, see § 677.
- 5 [In re Skero](#), 253 S.W.3d 884 (Tex. App. Beaumont 2008).
- 6 [Second Nat. Bank v. Becker](#), 62 Ohio St. 289, 56 N.E. 1025 (1900).
- 7 [Belding v. State](#), 121 Ohio St. 393, 8 Ohio L. Abs. 28, 169 N.E. 301 (1929).
- 8 Am. Jur. 2d, State and Local Taxation § 766.
- 9 [Hubbell v. Higgins](#), 148 Iowa 36, 126 N.W. 914 (1910); [State v. McFarland](#), 60 Wash. 98, 110 P. 792 (1910).
- 10 [Turner v. State ex rel. Gruver](#), 168 So. 2d 192 (Fla. 3d DCA 1964).

- 11 [Ex parte Small, 92 Okla. Crim. 101, 221 P.2d 669 \(1950\)](#) (a city ordinance providing for a fine upon a failure to pay a fee assessed for handling and treating garbage and trash and further providing for imprisonment for the nonpayment of the fine assessed was not violative of the constitutional prohibition where the punishment was directed to the neglect or refusal to comply with a public duty imposed by law).
- 12 [Am. Jur. 2d, Automobiles and Highway Traffic § 169.](#)
- 13 [Am. Jur. 2d, Divorce and Separation § 776.](#)
- 14 [Am. Jur. 2d, Divorce and Separation §§ 935, 942.](#)
- 15 [Am. Jur. 2d, Divorce and Separation § 1010.](#)
- 16 [Am. Jur. 2d, Desertion and Nonsupport § 72.](#)

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## 16B Am. Jur. 2d Constitutional Law § 675

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 7. Prohibition of Imprisonment for Debt

## § 675. Damages arising out of torts as "debts" for purposes of prohibitions on imprisonment for debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1106

It is generally held that the term "debt," in the context of a constitutional prohibition against imprisonment for debt, does not include damages arising from torts.<sup>1</sup> Thus, the right to imprison a judgment debtor in an action based upon a tort exists,<sup>2</sup> even though it may be contended that the judgment for damages recovered in such an action constitutes a debt owing by the defendant to the plaintiff.<sup>3</sup> Under this rule, defendants in tort actions have been imprisoned without violation of the constitution in actions involving many varieties of tort, including—

— libel.<sup>4</sup>

— assault and battery.<sup>5</sup>

— environmental torts.<sup>6</sup>

— trespass.<sup>7</sup>

— replevin.<sup>8</sup>

— trover and conversion.<sup>9</sup>

Moreover, a constitutional provision that no person is to be imprisoned for debt does not inhibit punishment for tortious acts although committed in the procurement of contracts under which the defrauded party suffers loss.<sup>10</sup>

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Footnotes

- 1 Reese v. Baker, 98 Fla. 52, 123 So. 3 (1929); Stidham v. Du Bose, 128 S.C. 318, 121 S.E. 791, 33 A.L.R. 645 (1924).
- 2 Stidham v. Du Bose, 128 S.C. 318, 121 S.E. 791, 33 A.L.R. 645 (1924); Dempsey v. Hollis, 116 Vt. 316, 75 A.2d 662 (1950).
- 3 Stidham v. Du Bose, 128 S.C. 318, 121 S.E. 791, 33 A.L.R. 645 (1924); Ex parte Milecke, 52 Wash. 312, 100 P. 743 (1909).
- 4 Moore v. Green, 73 N.C. 394, 1875 WL 2842 (1875).
- 5 Ex parte Berry, 85 S.C. 243, 67 S.E. 225 (1910); Dempsey v. Hollis, 116 Vt. 316, 75 A.2d 662 (1950).
- 6 Central Delta Water Agency v. State Water Resources Control Bd., 17 Cal. App. 4th 621, 21 Cal. Rptr. 2d 453 (3d Dist. 1993).
- 7 People ex rel. Brennan v. Cotton, 14 Ill. 414, 1853 WL 4743 (1853); Dungan v. Read, 167 Pa. 393, 31 A. 639 (1895).
- 8 Fuller v. Bowker, 11 Mich. 204, 1863 WL 1180 (1863).
- 9 Harris v. Bridges, 57 Ga. 407, 1876 WL 3195 (1876); Hormann v. Sherin, 8 S.D. 36, 65 N.W. 434 (1895); Bombardier v. Goodrich, 94 Vt. 208, 110 A. 11, 9 A.L.R. 1028 (1920); Cotton v. Sharpstein, 14 Wis. 226, 1861 WL 1572 (1861).
- 10 Davis v. State, 237 Ala. 143, 185 So. 774 (1938).

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## 16B Am. Jur. 2d Constitutional Law § 676

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 7. Prohibition of Imprisonment for Debt

## § 676. Debts arising from crimes as "debts" for purposes of prohibitions on imprisonment for debt; criminal fines or penalties

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1106

### A.L.R. Library

[Constitutionality of "bad check" statute, 16 A.L.R.4th 631](#)

[Constitutional provision against imprisonment for debt as applicable to nonpayment of tax, 48 A.L.R.3d 1324](#)

The imprisonment of one who has committed a crime which creates or involves a debt, such as intentionally issuing a bad check,<sup>1</sup> fraud,<sup>2</sup> knowingly obtaining the property of another by deception with intent to deprive the owner thereof,<sup>3</sup> or theft of another's property, does not violate a state constitutional provision barring imprisonment for debt.<sup>4</sup> Similarly, a sentence of confinement for failure to collect and remit taxes that one is obligated by law to collect is the result of a penal violation of a statute and does not constitute imprisonment for debt.<sup>5</sup>

The prohibition against imprisonment for debt does not preclude—

— requiring as a condition of probation that a defendant repay loans the defendant obtained from pawnbrokers using stolen silver as collateral directly, since this condition relates to the criminal offense for which the defendant was convicted.<sup>6</sup>

— a state's withdrawal of a plea offer that is contingent on restitution because the defendant cannot pay restitution.<sup>7</sup>

— denying a prisoner bail while the prisoner's appeal is pending on the theory that the prisoner's financial condition poses a risk of flight, since the prisoner has been imprisoned for conviction of criminal acts, and the constitutional prohibition is thus inapplicable.<sup>8</sup>

On the other hand, criminal prosecution of an employer for violating a labor law provision requiring an employer to pay all wages due at least twice each calendar month on regular paydays violates a state constitutional prohibition against imprisonment for debt.<sup>9</sup>

Fines or penalties arising from a violation of the penal laws of a state or of city or village ordinances are not debts within the meaning of a constitutional provision prohibiting imprisonment for debt.<sup>10</sup> Hence, imprisonment for the failure to pay a fine or other assessment is not an unconstitutional imprisonment for debt.<sup>11</sup>

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#### Footnotes

- 1 [Steeley v. State](#), 533 So. 2d 665 (Ala. Crim. App. 1988); [Cobb v. State](#), 246 Ga. 567, 272 S.E.2d 299 (1980); [State v. Kock](#), 207 Neb. 731, 300 N.W.2d 824 (1981); [State v. McDowell](#), 312 N.W.2d 301 (N.D. 1981).  
Revocation of a defendant's probation for writing an insufficient funds check does not amount to the defendant's being unconstitutionally imprisoned for debt. [State v. Macy](#), 403 N.W.2d 743 (S.D. 1987).
- 2 [State v. Yost](#), 232 Kan. 370, 654 P.2d 458 (1982) (overruled on other grounds by, [State v. Haines](#), 238 Kan. 478, 712 P.2d 1211 (1986)); [State v. Pike](#), 118 Wash. 2d 585, 826 P.2d 152 (1992).  
Defendant's conviction of knowingly concealing, with intent to defraud, cattle mortgaged or pledged to the Farmers' Home Administration went beyond a failure to pay a civil debt and constituted a fraudulent conversion of collateral to the defendant's own use; thus, his conviction was not an improper imprisonment for debt. [U.S. v. Archambault](#), 767 F.2d 402 (8th Cir. 1985).
- 3 [State v. Hatch](#), 346 N.W.2d 268 (N.D. 1984).
- 4 [Holland v. State](#), 440 So. 2d 1236 (Ala. Crim. App. 1983); [People v. Collie](#), 682 P.2d 1208 (Colo. App. 1983); [Connally v. State](#), 265 Ga. 563, 458 S.E.2d 336 (1995).  
A prison sentence for a conviction of passing bad checks does not violate a constitutional prohibition against imprisonment for debt. [State v. Harris](#), 913 S.W.2d 348 (Mo. Ct. App. E.D. 1995).
- 5 [Com. v. Smallhoover](#), 389 Pa. Super. 575, 567 A.2d 1055 (1989).  
A constitutional prohibition against imprisonment for "debt" does not apply to the prosecution of a supplier of motor fuel for failure to remit motor fuel taxes collected; the nature of the obligation was not a contractual liability to pay money but rather was a failure of a person with the duty to collect taxes on behalf of the state to remit that tax to the state. [Wisembaker v. State](#), 860 S.W.2d 681 (Tex. App. Austin 1993), petition for discretionary review refused, (Jan. 26, 1994).
- 6 [State v. Froneberger](#), 81 N.C. App. 398, 344 S.E.2d 344 (1986).
- 7 [Malone v. State](#), 973 So. 2d 1220 (Fla. 4th DCA 2008).
- 8 [Jurek v. McFaul](#), 39 Ohio St. 3d 42, 528 N.E.2d 1260 (1988).
- 9 [Reynolds v. Advance Alarms, Inc.](#), 2009 OK 97, 232 P.3d 907 (Okla. 2009), as corrected, (Dec. 16, 2009).
- 10 [Freeman v. U.S.](#), 217 U.S. 539, 30 S. Ct. 592, 54 L. Ed. 874 (1910); [City of Wichita v. Lucero](#), 255 Kan. 437, 874 P.2d 1144 (1994) (abrogated on other grounds by, [State v. Berreth](#), 294 Kan. 98, 273 P.3d 752 (2012)); [Payne v. State](#), 462 So. 2d 902 (Miss. 1984); [Mozorosky v. Hurlburt](#), 106 Or. 274, 198 P. 556, 15 A.L.R. 1076 (1921); [Shafer v. State](#), 842 S.W.2d 734 (Tex. App. Dallas 1992), petition for discretionary review refused, (Feb. 24, 1993).



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The imposition of fines and courts costs for convictions of aggravated robbery does not imprison a defendant for debt in violation of his or her state and federal constitutional rights. [Alexander v. State, 868 S.W.2d 356 \(Tex. App. Dallas 1993\)](#).

[Murphy v. State, 119 Or. 658, 250 P. 834, 49 A.L.R. 384 \(1926\)](#).

Statutes providing for payment of victim assessments as a condition of probation do not violate the state constitution's prohibition against imprisonment for debt, where procedural safeguards ensure that no defendant will be incarcerated for his or her inability to pay a penalty assessment, including the defendant's opportunity at a show cause hearing to prove that the violation was not willful, and the defendant's right to petition the court at any time for a reduction based on inability to pay. [State v. Campbell, 84 Wash. App. 596, 929 P.2d 1175 \(Div. 2 1997\)](#).

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## 16B Am. Jur. 2d Constitutional Law § 677

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

##### 7. Prohibition of Imprisonment for Debt

## § 677. Enforcement of court decrees or orders as "debts" for purposes of prohibitions on imprisonment for debt; contempt proceedings

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1106

### A.L.R. Library

[Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 A.L.R.3d 926](#)

[Award of attorneys' fees under sec. 813\(a\)\(3\) of Fair Debt Collection Practices Act \(15 U.S.C.A. sec. 1692k\(a\)\(3\)\), 132 A.L.R. Fed. 477](#)

The constitutional prohibition against imprisonment for debt has often been sought to be applied to proceedings which are the method of enforcement of a decree of an equity court. It is often held that a punishment of contempt of court by such an equity court for the violation of a decree does not constitute imprisonment for debt within the meaning of the constitutional prohibition.<sup>1</sup> Under this view, imprisonment for contempt of court of one who is able to pay a lawful debt and who has been ordered by the court to do so but who simply refuses to do so is not barred by the prohibition against imprisonment for debt.<sup>2</sup> However, the contrary has also been held,<sup>3</sup> so as to invalidate the enforcement through contempt of debts not involving support.<sup>4</sup> Under the latter view, an order requiring defendant to pay the balance of a judgment or be placed in jail as punishment for missing a deposition is void.<sup>5</sup>

**Observation:**

Whether a civil contempt order which imposes a penalty of imprisonment violates a constitutional ban on imprisonment for debt may depend on whether the court makes any finding as to the person's ability to pay, or takes ability to pay into consideration.<sup>6</sup>

With respect to the constitutionality of a statute authorizing the imprisonment of a judgment debtor for the nonpayment of attorney's fees<sup>7</sup> and costs<sup>8</sup> in a civil action, the question sometimes depends upon whether the action arises from a contract, express or implied, or from a tort. In cases of contract, the courts generally hold that the costs are debts so as to prevent imprisonment for their nonpayment, on the ground that the costs are merely a part of, and incident to, the debt.<sup>9</sup> In cases of torts, however, the weight of authority is that the costs are not debts so as to prevent imprisonment for their nonpayment.<sup>10</sup>

Although there is authority to the contrary, it has been held that obligations arising from court orders entered in the course of divorce or similar proceedings, requiring the payment of attorney's fees, are not debts for the purposes of a constitutional provision against imprisonment for debt and so may be enforced by imprisonment for contempt of court.<sup>11</sup>

Statutes authorizing imprisonment for nonpayment of costs in criminal proceedings have generally been upheld on the basis that such costs are not debts within the meaning of the constitutional prohibition against imprisonment for debt.<sup>12</sup>

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**Footnotes**

- 1 [Fishman v. Fishman](#), 656 So. 2d 1250 (Fla. 1995); [Sgambati v. Sgambati](#), 242 N.J. Super. 688, 577 A.2d 1328 (Ch. Div. 1990); [Hall v. Hall](#), 114 N.M. 378, 1992-NMCA-097, 838 P.2d 995 (Ct. App. 1992); [Collins v. Collins](#), 2018-Ohio-1512, 110 N.E.3d 999 (Ohio Ct. App. 8th Dist. Cuyahoga County 2018); [McCrary v. McCrary](#), 1986 OK 49, 723 P.2d 268, 72 A.L.R.4th 289 (Okla. 1986).
- 2 [Santibanez v. Wier McMahon & Co.](#), 105 F.3d 234, 46 Fed. R. Evid. Serv. 517 (5th Cir. 1997); [Minor v. Minor](#), 901 S.W.2d 163 (Mo. Ct. App. E.D. 1995).
- 3 [Mississippi Com'n on Judicial Performance v. Patton](#), 57 So. 3d 626 (Miss. 2011) (a county court judge's action of imprisoning a litigant for failure to pay a civil judgment violated a provision of state constitution prohibiting the imprisonment of a person for debt); [In Interest of R.H.W. III](#), 542 S.W.3d 724 (Tex. App. Houston 14th Dist. 2018), rule 53.7(f) motion granted, (Mar. 12, 2018).  
A contractual obligation to pay money cannot be enforced by a court's contempt power because of the constitutional prohibition against imprisonment for debt. [McQuady v. McQuady](#), 523 So. 2d 785 (Fla. 5th DCA 1988).
- 4 [Al Ghurair v. Zaczac](#), 255 So. 3d 485 (Fla. 3d DCA 2018).
- 5 [Sidebottom v. Watershed Equine, LLC](#), 564 S.W.3d 331 (Ky. Ct. App. 2018).
- 6 [Stehle v. Zimmerebner](#), 2016 Ark. 290, 497 S.W.3d 188 (2016).
- 7 [State ex rel. Egger v. Marion County Superior Court Civil Div., Room No. 7](#), 435 N.E.2d 993 (Ind. 1982).  
As a general rule, attorney's fees are considered a debt, and a person cannot be imprisoned for failure to pay such fees. [In re Richardson](#), 528 S.W.3d 155 (Tex. App. El Paso 2017).

- 8                    [Allee v. State, 462 N.E.2d 1074 \(Ind. Ct. App. 1984\)](#) (use of the trial court's contempt power to coerce payment of the blood test costs in a paternity action was warranted).
- 9                    [Fishman v. Fishman, 656 So. 2d 1250 \(Fla. 1995\)](#).
- 10                  [Ex parte Binse, 932 S.W.2d 619 \(Tex. App. Houston 14th Dist. 1996\)](#) (failure to pay child support and court costs).
- 11                  [Am. Jur. 2d, Divorce and Separation § 776](#).
- 12                  [State v. Campbell, 84 Wash. App. 596, 929 P.2d 1175 \(Div. 2 1997\)](#).

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## 16B Am. Jur. 2d Constitutional Law § 678

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 8. Guarantee of Republican Form of Government; Protection of States Against Invasion and Domestic Violence

## § 678. Guarantee of republican form of government, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [States](#)  4.3

The Constitution of the United States provides that the United States must guarantee to every state a republican form of government.<sup>1</sup> Proof of compliance with the guarantee is automatically furnished, with respect to a state entering the union, by the action of Congress in admitting the new state.<sup>2</sup> After a state has been admitted to the Union, the effect of this guarantee appears to be to prohibit the state from exchanging its republican constitution for an antirepublican constitution.<sup>3</sup> The constitutional provision that the United States must guarantee to every state a republican form of government has been said to express the full limit of national control over the internal affairs of a state, for normally a state's internal affairs are matters of its own discretion, subject only to the limitations prescribed by the Constitution.<sup>4</sup>

While the Supreme Court, in an early case, stated that the word "state," as it is used in the clause of the Federal Constitution guaranteeing to each state a republican form of government, refers to a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed,<sup>5</sup> it is clear that this guarantee does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. The forms of local government in this country have been most varied, running all the way from the pure democracy of the town meeting form of government up to such absolute control by the legislature of the state that communities have been deprived of any voice in their local affairs. In view of these facts, the opinion has been expressed that the constitutional guarantee was intended to apply only to the form of government for the state at large, and not at all to the local government prescribed by the state for its municipalities and other subdivisions.<sup>6</sup> Thus, the commission form of local government does not violate the federal constitutional provision.<sup>7</sup> Similarly, the city-manager form of government is

valid.<sup>8</sup> A constitutional amendment consolidating a city and county government into one and authorizing the people to adopt a charter for their government and to amend such charter and to provide for the election or appointment of municipal officers is not invalid as exempting a portion of the state from the provisions of the constitution and general laws.<sup>9</sup> However, it has been held that a state cannot grant to a municipality within its boundaries absolute rights and prerogatives beyond recall, since to do so would be to permit the creation of a state within a state.<sup>10</sup>

The Supreme Court has recognized that the Guarantee Clause is a restraint upon the political institutions and processes of the states.<sup>11</sup>

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#### Footnotes

- 1 U.S. Const. Art. IV, § 4.
- 2 § 683.
- 3 *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479 (1911).  
The federal constitutional guarantee of a republican form of government bars amendment of a state constitution so as to change the form of the state government to other than a republican form. *Downs v. City of Birmingham*, 240 Ala. 177, 198 So. 231 (1940).
- 4 *State of South Carolina v. U.S.*, 199 U.S. 437, 26 S. Ct. 110, 50 L. Ed. 261 (1905).
- 5 *Texas v. White*, 74 U.S. 700, 19 L. Ed. 227, 1868 WL 11083 (1868) (overruled in part on other grounds by, *Morgan v. U.S.*, 20 Ct. Cl. 533, 113 U.S. 476, 5 S. Ct. 588, 28 L. Ed. 1044 (1885)).  
As used in this sense, the word "state" does not include the District of Columbia. *Darby v. U.S.*, 681 A.2d 1156 (D.C. 1996).
- 6 *Sarlls v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718 (1929); *State ex rel. Porterie v. Smith*, 184 La. 263, 166 So. 72 (1935); *Hile v. City of Cleveland*, 107 Ohio St. 144, 1 Ohio L. Abs. 261, 141 N.E. 35 (1923); *State v. Summers*, 33 S.D. 40, 144 N.W. 730 (1913); *Walker v. City of Spokane*, 62 Wash. 312, 113 P. 775 (1911).  
The Guarantee Clause is not implicated by a statute that applies only to municipal governments. *Fraternal Order of Police Lodge No. 165 v. City of Choctaw*, 1996 OK 78, 933 P.2d 261 (Okla. 1996).
- 7 *Sarlls v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718 (1929); *Walker v. City of Spokane*, 62 Wash. 312, 113 P. 775 (1911).
- 8 *Sarlls v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718 (1929); *Hile v. City of Cleveland*, 107 Ohio St. 144, 1 Ohio L. Abs. 261, 141 N.E. 35 (1923).
- 9 *People ex rel. Elder v. Sours*, 31 Colo. 369, 74 P. 167 (1903).
- 10 *Kiernan v. City of Portland*, 57 Or. 454, 111 P. 379 (1910).
- 11 *Minor v. Happersett*, 88 U.S. 162, 22 L. Ed. 627, 1874 WL 17301 (1874).

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## 16B Am. Jur. 2d Constitutional Law § 679

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 8. Guarantee of Republican Form of Government; Protection of States Against Invasion and Domestic Violence

## § 679. Meaning of "republican form of government"

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [States](#)  4.3

Since the Constitution of the United States did not attempt to define the essential elements of a republican form of government, it is customary to refer to the forms of government of the original states as approved criteria;<sup>1</sup> it is universally recognized that there was nothing in any of the forms of government prevailing in the original 13 states at the time of the adoption of the Constitution which was not consistent with a republican form of government.<sup>2</sup>

A republican form of government as guaranteed by the Constitution of the United States has been defined as one which derives all its powers directly or indirectly from the people and which is administered by persons holding their offices for a limited period or during good behavior.<sup>3</sup> This phrase connotes a government by the people through representatives appointed by them, either by direct vote or through some intervening officer or body selected by them and appointed by direct vote for that purpose.<sup>4</sup>

To be a "republic," under the clause guaranteeing to each state a republican form of government, a state need not parcel out powers among different branches in any particular fashion, such as that in the Federal Constitution.<sup>5</sup> However, certain attributes have been described as characteristic of a republican form of government, and as not characteristic of an antirepublican government. The distinguishing feature of a republican form of government, as required by the Guarantee Clause, is the right of the people to choose their own officers for governmental administration, and pass their own laws.<sup>6</sup> In a republican form of government, the governor or president has only a delegated power and a limited sphere of action.<sup>7</sup> In a republic, the tenure of office may be for a short or a long period or even for life; yet those in office are at all times answerable, either directly or indirectly, to the people, and the power to enact laws and control public servants lies with the great body of the people. From

this it follows that each republic may differ in its political system or in the political machinery by which it moves, but so long as the ultimate control of its officials and affairs of state remains in its citizens, it will, in the eyes of all republics, be recognized as a government of the republican type.<sup>8</sup> No government is republican in form which fails to secure the purity of elections,<sup>9</sup> and the principle of majority rule is at the foundation of republican systems of government.<sup>10</sup>

The right of every citizen of the United States to follow any lawful calling, business, or profession he or she may choose, subject only to such restrictions as are imposed on all persons of like age, sex, and condition, is in many respects considered to be a distinguishing feature of the republican institutions of this country.<sup>11</sup> Due protection of the rights of property has in similar manner been regarded as a vital principle of republican institutions,<sup>12</sup> and every republican government is duty-bound to protect all its citizens in the enjoyment of the equality of rights.<sup>13</sup>

Comparatively few attempts have been made to define an antirepublican form of government; yet it has been said that if a state should, for example, attempt to surrender its powers to an executive for life, with a provision that on his death that authority should pass by inheritance to his son, the form of government would no longer be republican.<sup>14</sup>

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#### Footnotes

- 1 [Minor v. Happersett](#), 88 U.S. 162, 22 L. Ed. 627, 1874 WL 17301 (1874); [In re Pfahler](#), 150 Cal. 71, 88 P. 270 (1906).
- 2 [Kiernan v. City of Portland](#), 57 Or. 454, 111 P. 379 (1910); [Walker v. City of Spokane](#), 62 Wash. 312, 113 P. 775 (1911).
- 3 [Cochran v. Louisiana State Board of Education](#), 281 U.S. 370, 50 S. Ct. 335, 74 L. Ed. 913 (1930); [State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County](#), 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930).  
A distinguishing feature of this form of government is that people are capable of self-government and have the right to choose their own officials for governmental affairs and enact their own laws pursuant to the legislative power reposed in representative bodies. This representative system is the essence of the republican form of government and is premised upon the fact that the people cannot speak in mass, and the right to choose a representative is every citizen's portion of sovereign power. [Harris v. Shanahan](#), 192 Kan. 183, 387 P.2d 771 (1963).
- 4 [Walker v. City of Spokane](#), 62 Wash. 312, 113 P. 775 (1911).
- 5 [Beary Landscaping, Inc. v. Costigan](#), 667 F.3d 947 (7th Cir. 2012).
- 6 [Kerpen v. Metropolitan Washington Airports Authority](#), 907 F.3d 152 (4th Cir. 2018), cert. denied, 140 S. Ct. 132, 205 L. Ed. 2d 25 (2019).
- 7 [State v. Nichols](#), 26 Ark. 74, 1870 WL 778 (1870).
- 8 [Duncan v. McCall](#), 139 U.S. 449, 11 S. Ct. 573, 35 L. Ed. 219 (1891); [Thomas v. Reid](#), 1930 OK 49, 142 Okla. 38, 285 P. 92 (1930); [Kiernan v. City of Portland](#), 57 Or. 454, 111 P. 379 (1910).  
The distinguishing feature of the republican form of government is the right of the people to choose their own officers for governmental administration and pass their own laws. [Duncan v. McCall](#), 139 U.S. 449, 11 S. Ct. 573, 35 L. Ed. 219 (1891).
- 9 [Thomas v. Reid](#), 1930 OK 49, 142 Okla. 38, 285 P. 92 (1930); [Cook v. State](#), 90 Tenn. 407, 16 S.W. 471 (1891).
- 10 [Maynard v. Board of District Canvassers](#), 84 Mich. 228, 47 N.W. 756 (1890).
- 11 [Dent v. State of W.Va.](#), 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889).
- 12 [Chicago, B. & Q.R. Co. v. City of Chicago](#), 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897).
- 13 [U.S. v. Cruikshank](#), 92 U.S. 542, 23 L. Ed. 588, 1875 WL 17550 (1875); [Minor v. Happersett](#), 88 U.S. 162, 22 L. Ed. 627, 1874 WL 17301 (1874).



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## 16B Am. Jur. 2d Constitutional Law § 680

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 8. Guarantee of Republican Form of Government; Protection of States Against Invasion and Domestic Violence

### § 680. Violation of guarantee of republican form of government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [States](#)  4.3

From time to time, questions have been raised as to whether particular constitutional provisions or governmental institutions fulfill the requirement of a republican form of government. The republican form of government requirement of the Guarantee Clause is not violated when States retain the ability to set their legislative agendas and when state government officials remain accountable to the local electorate.<sup>1</sup> The legislative creation and alteration of municipal corporations,<sup>2</sup> school districts,<sup>3</sup> or drainage districts,<sup>4</sup> and legislative regulations of the judicial system, such as those requiring counties to pay additional salaries of judges, have all been determined to be consistent with a republican form of government.<sup>5</sup> Statutory provisions for the recall of public officers are also not obnoxious to a republican form of government.<sup>6</sup>

A state legislature's proposed constitutional amendment allowing the legislature to provide by a general law for forest fire protection in counties, to define what constitutes "forest lands," and to provide for the manner of levying and collecting assessments and the administration of those assessments does not, on its face, violate the republican form of government guarantee, even though the voters in some counties have already voted to impose the levy within their counties.<sup>7</sup> Proceedings under the Clean Air Act, authorizing the Environmental Protection Agency to enforce a regulation which requires a state to withhold registration from vehicles that do not comply with applicable pollution standards and procedures, do not violate the constitutional guarantee to each state of a republican form of government.<sup>8</sup> An amendment to a state constitution, providing that the legislature cannot enact special or local legislation affecting a certain county in the state without the approval of the electors of that county, does not conflict with the Federal Constitution's guarantee of a republican form of government.<sup>9</sup>

A statute reorganizing the executive branch of the state government has been held not to be violative of fundamental principles of a republican form of government.<sup>10</sup> The establishment of commissions to adjust the compensation to be awarded injured workers, under a system of industrial insurance, without resort to the courts is also valid under this clause.<sup>11</sup> Application of a section of a state law shifting the burden of proof to an oil and gas lessee to establish compliance with the implied covenant to explore and develop the land to pending litigation did not violate that section of the United States Constitution guaranteeing each state a republican form of government.<sup>12</sup>

A statute providing for the purchase of school books for free distribution does not deny a republican form of government.<sup>13</sup> A federal statute that preempts state regulation of intrastate motor carrier activities does not violate the Guarantee Clause as the statute is a substantive constraint on the power of state governments to regulate intrastate trucking, not a fundamental restructuring of the form of state governments.<sup>14</sup> Also, it cannot be contended that the establishment of a state liquor monopoly is tantamount to the creation of a communistic form of government.<sup>15</sup>

Other claims of denial of a republican form of government which have been judicially rejected include claims pertaining to:

- a statute providing the Secretary of the Interior with authority to acquire trust land for an Indian tribe<sup>16</sup>
- an airport authority's collection of tolls from a toll road<sup>17</sup>
- a settlement and consent decree in an underlying qui tam action, requiring a county to promote legislation through its county executive to ban "source-of-income" discrimination in housing<sup>18</sup>

On the other hand, taxation for a private purpose is prohibited by the clause of the United States Constitution that guarantees to every state a republican form of government, since such a form of government forbids the raising of taxes for anything but a public purpose.<sup>19</sup> A state would be in violation of the Guarantee Clause if it permitted private armed forces in the community.<sup>20</sup> Also, the legislature has no power to declare that county recorders elected for a term of two years shall hold office for four years, since a republican form of government rests on the right to select public officers for terms fixed in advance.<sup>21</sup>

A claim that a state statute constitutes arbitrary and capricious state action in its irrational disregard of the standard of apportionment prescribed by the constitution of a state, or of any standard, effecting a gross disproportion of representation to voting population, has been held neither to rest upon nor to implicate the clause in [Article IV, § 4 of the United States Constitution](#), providing that the United States shall guarantee to every state a republican form of government.<sup>22</sup>

A state's claim for reimbursement against the United States for the expenses it had incurred coping with a "flood" of undocumented aliens resulting from the failure of the national government to enforce its immigration and naturalization policies was held not to present a justiciable claim for violation of the republican form of Guarantee Clause of the United States Constitution, inasmuch as the state suggested no manageable standards by which the court could decide the type and degree of immigration law enforcement that would suffice to comply with the strictures of Guarantee Clause.<sup>23</sup>

**Observation:**

The constitutional guarantee of a republican form of government in every state applies to states only and does not restrict the power of Congress to legislate for the District of Columbia.<sup>24</sup>

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## Footnotes

- 1 Kerpen v. Metropolitan Washington Airports Authority, 907 F.3d 152 (4th Cir. 2018), cert. denied, 140 S. Ct. 132, 205 L. Ed. 2d 25 (2019).
- 2 Forsyth v. City of Hammond, 166 U.S. 506, 17 S. Ct. 665, 41 L. Ed. 1095 (1897).
- 3 Attorney General of State of Michigan v. Lowrey, 199 U.S. 233, 26 S. Ct. 27, 50 L. Ed. 167 (1905).
- 4 O'Neill v. Leamer, 239 U.S. 244, 36 S. Ct. 54, 60 L. Ed. 249 (1915).
- 5 Hammond v. Clark, 136 Ga. 313, 71 S.E. 479 (1911).
- 6 Am. Jur. 2d, Public Officers and Employees § 199.
- 7 Opinion of the Justices, 468 So. 2d 883 (Ala. 1985).
- 8 U.S. v. Ohio Dept. of Highway Safety, 635 F.2d 1195 (6th Cir. 1980).
- 9 Cagle v. Qualified Electors of Winston County, 470 So. 2d 1208 (Ala. 1985).
- 10 Graham v. Jones, 198 La. 507, 3 So. 2d 761 (1941).
- 11 State v. Mountain Timber Co., 75 Wash. 581, 135 P. 645 (1913), aff'd, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917).
- 12 Amoco Production Co. v. Douglas Energy Co., Inc., 613 F. Supp. 730 (D. Kan. 1985).
- 13 Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A.L.R. 1183 (1928).
- 14 Kelley v. U.S., 69 F.3d 1503 (10th Cir. 1995).
- 15 Frankenstein v. Leonard, 134 Ohio St. 251, 12 Ohio Op. 54, 16 N.E.2d 424 (1938).
- 16 County of Charles Mix v. U.S. Dept. of Interior, 799 F. Supp. 2d 1027 (D.S.D. 2011), aff'd, 674 F.3d 898 (8th Cir. 2012).
- 17 Corr v. Metropolitan Washington Airports Authority, 800 F. Supp. 2d 743 (E.D. Va. 2011), aff'd, 740 F.3d 295 (4th Cir. 2014).
- 18 U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y., 712 F.3d 761 (2d Cir. 2013).
- 19 City of Cleveland v. Ruple, 130 Ohio St. 465, 5 Ohio Op. 69, 200 N.E. 507, 103 A.L.R. 853 (1936); Heimerl v. Ozaukee County, 256 Wis. 151, 40 N.W.2d 564 (1949).
- 20 Matter of Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202 (2d Dep't 1944).
- 21 Board of Elections for Franklin County v. State ex rel. Schneider, 128 Ohio St. 273, 191 N.E. 115, 97 A.L.R. 1417 (1934).
- 22 Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).
- 23 State of Tex. v. U.S., 106 F.3d 661 (5th Cir. 1997) (even if a state's claim for reimbursement of expenditures on undocumented aliens presented a justiciable complaint, it failed to allege any realistic risk of denying the state its guaranteed republican form of government, where there was no federal mandate for the states to take any action with respect to undocumented aliens, and any inaction by the federal government on immigration enforcement over payment of state expenditures did not realistically pose a meaningful risk of altering the state's government form or method of functioning).  
Requiring a state to increase and expend state taxes for law enforcement and educational expenses of illegal aliens did not pose any realistic risk of altering the form or method of functioning of state government to support a state's claim that it was being denied a republican form of government. *State of N.J. v. U.S.*, 91 F.3d 463 (3d Cir. 1996).
- 24 Darby v. U.S., 681 A.2d 1156 (D.C. 1996).

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## 16B Am. Jur. 2d Constitutional Law § 681

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 8. Guarantee of Republican Form of Government; Protection of States Against Invasion and Domestic Violence

### § 681. Violation of guarantee of republican form of government—Blending powers of government departments

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [States](#)  4.3

The doctrine of separation of powers is an inherent and integral element of the republican form of government and is expressly guaranteed to the states by the Federal Constitution.<sup>1</sup> Combining incompatible functions in one governmental agency, or allowing one division to usurp powers expressly delegated to another is generally deemed offensive to federal constitutional order, whether the separation-of-powers doctrine is explicitly mandated by the text of the United States Constitution or is merely recognized as implicit in its provisions.<sup>2</sup> Nevertheless, the guarantee of a republican form of government is not violated when a single state officer is vested with powers which represent the blending of powers of different departments of the government.<sup>3</sup> A state is not forbidden under the Federal Constitution from providing for administrative revocation of a defendant's court-ordered probation on the basis of the doctrine of separation of powers.<sup>4</sup> Likewise, there is no express constitutional provision requiring that the doctrine of separation of powers be applied to the states.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [Solomon v. State](#), 303 Kan. 512, 364 P.3d 536 (2015); [Gleason v. Samaritan Home](#), 260 Kan. 970, 926 P.2d 1349 (1996).
- <sup>2</sup> [Tweedy v. Oklahoma Bar Ass'n](#), 1981 OK 12, 624 P.2d 1049 (Okla. 1981).

- 3 [Highland Farms Dairy v. Agnew](#), 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937); [Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.](#), 191 N.Y. 123, 83 N.E. 693 (1908).  
As to the blending or overlapping of powers of separate departments of government, generally, see §§ 242 to 244.
- 4 [Ware v. Gagnon](#), 659 F.2d 809 (7th Cir. 1981).
- 5 [Coniston Corp. v. Village of Hoffman Estates](#), 844 F.2d 461, 10 Fed. R. Serv. 3d 1294 (7th Cir. 1988); [In re Interrogatories Propounded by Senate Concerning House Bill 1078](#), 189 Colo. 1, 536 P.2d 308 (1975); [Parcell v. State](#), 228 Kan. 794, 620 P.2d 834 (1980); [State ex rel. Peterson v. Quinlivan](#), 198 Minn. 65, 268 N.W. 858 (1936).  
The principle of separation of powers is not enforceable against the states as a matter of federal constitutional law. [Verner v. State of Colo.](#), 533 F. Supp. 1109 (D. Colo. 1982), judgment aff'd, 716 F.2d 1352 (10th Cir. 1983).  
Unless power transferred from one branch of government to another branch is substantial or its retention essential to the "separation of powers" doctrine, there is no violation of the provision of Article IV, requiring the United States to guarantee to every state a republican form of government. [State v. Lehtola](#), 55 Wis. 2d 494, 198 N.W.2d 354 (1972).  
As to the departmental separation of governmental powers, generally, see §§ 234 to 330.

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## 16B Am. Jur. 2d Constitutional Law § 682

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 8. Guarantee of Republican Form of Government; Protection of States Against Invasion and Domestic Violence

### § 682. Violation of guarantee of republican form of government—Initiative and referendum

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [States](#)  4.3

The generally accepted view is that the system of direct legislation which has been in common use throughout the various state governments since their inception is consistent with a republican form of government, even though it may deprive a state legislature of some lawmaking power or powers held by it at the adoption of the Federal Constitution. Accordingly, it has been determined that such direct powers of legislation may be exercised by the people through the initiative and referendum process,<sup>1</sup> on either the state or local level.<sup>2</sup>

#### Practice Tip:

A challenge under the Guarantee Clause to legislation adopted by the initiative process is not to be undertaken lightly, especially in a state where the initiative process has long been sustained by the courts. Such a challenge would require extensive briefing of the origins, history, and political theory underlying the Guarantee Clause and how they might bear on the statute at issue. Where such analysis is not undertaken, the challenge will not succeed.<sup>3</sup>



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Footnotes

- 1 State of Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916); Kiernan v. City of Portland, 223 U.S. 151, 32 S. Ct. 231, 56 L. Ed. 386 (1912); Pacific States Telephone & Telegraph Co. v. State of Oregon, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912); Cagle v. Qualified Electors of Winston County, 470 So. 2d 1208 (Ala. 1985); International Broth. of Firemen and Oilers, Local Union No. 49 v. Cincinnati Gas & Elec. Co., 33 Ohio Op. 99, 17 Ohio Supp. 179, 1946 WL 2852 (C.P. 1946); State v. Whisman, 36 S.D. 260, 154 N.W. 707 (1915); State v. Owen, 97 Wash. 466, 166 P. 793 (1917).
- 2 In re Pfahler, 150 Cal. 71, 88 P. 270 (1906); Eckerson v. City of Des Moines, 137 Iowa 452, 115 N.W. 177 (1908); State v. Summers, 33 S.D. 40, 144 N.W. 730 (1913); Walker v. City of Spokane, 62 Wash. 312, 113 P. 775 (1911).
- 3 As to the federal constitutional guarantee not applying to the forms of local government, generally, see § 678. State v. Montez, 309 Or. 564, 789 P.2d 1352 (1990).

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## 16B Am. Jur. 2d Constitutional Law § 683

American Jurisprudence, Second Edition | May 2021 Update

### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 8. Guarantee of Republican Form of Government; Protection of States Against Invasion and Domestic Violence

## § 683. Determining whether form of government is republican as a political question

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2583

West's Key Number Digest, [States](#)  4.3

### A.L.R. Library

[Application of Political Question Doctrine by U.S. Supreme Court, 75 A.L.R. Fed. 2d 1](#)

### Forms

Forms relating to failure to state justiciable controversy, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [[Westlaw®\(r\) Search Query](#)]

Generally,<sup>1</sup> whether a state has a republican form of government under [Article IV, § 4 of the Federal Constitution](#) has been held to be a political and not a judicial question and therefore to be determined not by the courts, but by the political department of

the federal government—that is, by Congress.<sup>2</sup> Under this view, the decision of Congress is binding on every other department and cannot be questioned in any judicial tribunal.<sup>3</sup> The republican form of democratic government requires that the judiciary refrain from disrupting the elaborate checks and balances which regulate how and by whom decisions are made at local, county, and state levels of government.<sup>4</sup> Thus, the United States Supreme Court has rejected, as nonjusticiable, claims under this clause that a state's resolution of a contested gubernatorial election deprived voters of a republican government<sup>5</sup> or that any of the following negated a republican form of government:

- the initiative and referendum process<sup>6</sup>
- a municipal charter amendment by municipal initiative and referendum<sup>7</sup>
- a state's constitutional amendment procedure<sup>8</sup>
- delegation to a court of power to form drainage districts<sup>9</sup>
- invalidation of a state reapportionment statute by referendum<sup>10</sup>
- a workers' compensation law<sup>11</sup>
- a state constitutional provision stating that a state statute cannot be held unconstitutional by the state supreme court except by a concurrence of least all the members of that court but one<sup>12</sup>
- a statutory delegation to an international cancer research agency authority to identify carcinogens<sup>13</sup>
- state legislature's argument that the state's independent congressional redistricting commission cannot be a repository of legislative authority because it is not a representative body<sup>14</sup>
- delegation to an agency of the power to control milk prices<sup>15</sup>

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#### Footnotes

- 1 U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y., 712 F.3d 761 (2d Cir. 2013); Kerpen v. Metropolitan Washington Airports Authority, 907 F.3d 152 (4th Cir. 2018), cert. denied, 140 S. Ct. 132, 205 L. Ed. 2d 25 (2019) ("for the most part"); South Dakota v. U.S. Dept. of Interior, 775 F. Supp. 2d 1129 (D.S.D. 2011) ("usually").
- 2 Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937); Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S. Ct. 335, 74 L. Ed. 913 (1930); State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930); Phillips v. Snyder, 836 F.3d 707 (6th Cir. 2016); Baum v. Newbry, 200 Or. 576, 267 P.2d 220 (1954).  
Claims based upon alleged violation of the federal constitutional provision that the United States will guarantee to every state a republican form of government are nonjusticiable only because they involve those elements which define a political question. Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).
- 3 State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930); Mountain Timber Co. v. State of Washington, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); Marshall v. Dye, 231 U.S. 250, 34 S. Ct. 92, 58 L. Ed. 206 (1913); Pacific States Telephone & Telegraph Co. v. State of Oregon, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912); Graham v. Jones, 198 La. 507, 3 So. 2d 761 (1941).

- 4 Montecalvo v. City of Utica, 170 Misc. 2d 107, 647 N.Y.S.2d 445 (Sup 1996), order aff'd, 233 A.D.2d 960,  
649 N.Y.S.2d 852 (4th Dep't 1996).
- 5 Taylor v. Beckham, 178 U.S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 (1900).
- 6 § 682.
- 7 Kiernan v. City of Portland, 223 U.S. 151, 32 S. Ct. 231, 56 L. Ed. 386 (1912).
- 8 Marshall v. Dye, 231 U.S. 250, 34 S. Ct. 92, 58 L. Ed. 206 (1913).
- 9 O'Neill v. Leamer, 239 U.S. 244, 36 S. Ct. 54, 60 L. Ed. 249 (1915).
- 10 State of Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916).
- 11 Mountain Timber Co. v. State of Washington, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917).
- 12 State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 281 U.S. 74, 50 S. Ct.  
228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930).
- 13 Monsanto Co. v. Office of Environmental Health Hazard Assessment, 22 Cal. App. 5th 534, 231 Cal. Rptr.  
3d 537 (5th Dist. 2018), review denied, (Aug. 15, 2018).
- 14 Arizona State Legislature v. Arizona Independent Redistricting Com'n, 997 F. Supp. 2d 1047 (D. Ariz. 2014),  
judgment aff'd, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015).
- 15 Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937).

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## 16B Am. Jur. 2d Constitutional Law § 684

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### Constitutional Law

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### IX. Fundamental Constitutional Rights and Privileges

#### C. Particular Fundamental Constitutional Rights

#### 8. Guarantee of Republican Form of Government; Protection of States Against Invasion and Domestic Violence

## § 684. Protection of states against invasion and domestic violence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [States](#)  4.3

[Article IV, § 4 of the United States Constitution](#)<sup>1</sup> not only provides that the United States must guarantee to every state a republican form of government, but also that the United States shall protect each of them against invasion and, on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence.<sup>2</sup> Referring to the latter portion of the provision, the Supreme Court long ago stated that it rested with Congress to determine upon the means proper to be adopted to fulfill this guarantee.<sup>3</sup> Thus, it has been recognized that Congress has the duty of suppressing sedition within a state under its obligation to guarantee to every state a republican form of government.<sup>4</sup>

Not only can the Congress and the President employ force to suppress domestic violence within the states, but the federal courts also can use their process and federal marshals to protect citizens in their federal rights from mobs and other forms of domestic violence.<sup>5</sup> Moreover, since the people of a state have guaranteed to the people of the United States to maintain a republican form of government, they not only have the right to protect themselves and their chosen form of government from attack from any source, but it is also their duty to do so.<sup>6</sup>

### Observation:

Like the Guarantee Clause, the clause providing for protection against invasion has been found to give rise to claims that are nonjusticiable political questions. A state presents a nonjusticiable political question when it claims that the United States violates the Invasion Clause by failing to stop the intrusion of illegal immigrants where the political branches of United States have not determined that an "invasion" has actually occurred.<sup>7</sup> This is because "[i]n order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state's government."<sup>8</sup>

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#### Footnotes

- 1 U.S. Const. Art. IV, § 4.
- 2 *Perpich v. Department of Defense*, 496 U.S. 334, 110 S. Ct. 2418, 110 L. Ed. 2d 312 (1990).
- 3 *Luther v. Borden*, 48 U.S. 1, 7 How. 1, 12 L. Ed. 581, 1849 WL 6413 (1849).
- 4 *Com. v. Nelson*, 377 Pa. 58, 104 A.2d 133 (1954), judgment *aff'd*, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956).  
As to federal power to suppress insurrection, generally, see *Am. Jur. 2d, Insurrection* § 2.  
As to federal statutes and offenses relating to riots and civil disorders, generally, see *Am. Jur. 2d, Mobs and Riots* §§ 5, 38 to 40.
- 5 *Hoxie School Dist. No. 46 of Lawrence County, Ark. v. Brewer*, 137 F. Supp. 364 (E.D. Ark. 1956), judgment *aff'd*, 238 F.2d 91 (8th Cir. 1956).
- 6 *Steiner v. Darby*, 88 Cal. App. 2d 481, 199 P.2d 429 (2d Dist. 1948).  
As to state power to suppress insurrection, generally, see *Am. Jur. 2d, Insurrection* § 3.
- 7 *Padavan v. U.S.*, 82 F.3d 23 (2d Cir. 1996); *State of Cal. v. U.S.*, 104 F.3d 1086 (9th Cir. 1997); *Chiles v. U.S.*, 69 F.3d 1094 (11th Cir. 1995).
- 8 *Padavan v. U.S.*, 82 F.3d 23 (2d Cir. 1996) (citing *The Federalist* No. 43 (James Madison)); *State of N.J. v. U.S.*, 91 F.3d 463 (3d Cir. 1996).

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